88-273

NO.

JUL 28 1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SYVASKY L. POYNER,

Petitioner,

v.

TONI V. BAIR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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I.

QUESTIONS PRESENTED FOR REVIEW

I. Was Poyner's Constitutional Right To Have An Attorney Present During Questioning Denied When He Was Merely Informed That "The Court Is Empowered" To Appoint An Attorney?

II. Under The Totality Of The Circumstances, Did Poyner Assert His Right To Counsel When He Stated "Didn't You Say I Had A Right To A Lawyer"?

III. Did Poyner Voluntarily, Knowingly And Intelligently Waive His Right To Counsel By Making A Limited Statement In Response To Perceived Threats When He Was

Exhausted, Drunk, Intellectually Deficient And When His Rights Had Been Explained In A Confusing And Misleading Way?

IV. Was Poyner's Constitutional Right To Remain Silent Denied When Police Continued To Interrogate Him After He Asserted His Right To Remain Silent?

V. Was Poyner's Videotaped Admission So Inextricably Linked To The Prior Inadmissible Statements So That It Was Inadmissible Despite Poyner's Execution Of A Written Rights Waiver Form?

TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED.....	(i)
II.	TABLE OF CONTENTS.....	(ii)
III.	TABLE OF AUTHORITIES.....	(iv)
IV.	PETITION FOR WRIT OF CERTIORARI.....	1
V.	OPINIONS BELOW.....	1
VI.	JURISDICTION.....	2
VII.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
VIII.	STATEMENT OF THE CASE....	3
IX.	REASONS FOR GRANTING THE WRIT.....	9
A.	Poyner Was Never Properly Advised Of His Constitutional Right To Have A Lawyer Present Prior To Interrogation.....	9
1.	The Clear Implication Of The Warning Actually Given Was That Poyner's Right To Counsel Would Only Attach At A Future Time.....	10
2.	The Clear Implication Of The Warning	

Actually Given Was That Poyner's Right To Have Counsel Appointed Was Discretionary With The Court..... 12

B. Poyner's Invocation Of His Right To Counsel Was Ignored By The Police..... 12

C. Poyner Did Not Voluntarily, Knowingly Or Intelligently Waive His Right To Counsel.. 13

D. Poyner's Invocation Of His Right To Remain Silent Was Ignored By The Police..... 16

E. The Court Below Applied Improper Constitutional Standards In Affirming The Admissibility Of The Videotaped Confession..... 18

X. PRAYER FOR RELIEF.... 21

XI. APPENDIX TO PETITION FOR WRIT OF CERTIORARI..... 22

III.

TABLE OF AUTHORITIES

Cases	Page
Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975).....	44
Carter v. State, 108 Idaho 788, 702 P.2d 826 (Idaho 1985).....	36
Chambers v. Florida, 309 U.S. 227 (1940).....	26
Clewis v. Texas, 386 U.S. 707 (1967).....	50
Darwin v. Connecticut, 391 U.S. 346 (1968).....	49
Edwards v. Arizona, 451 U.S. 477 (1981).....	34,37,41
Escobedo v. Illinois, 378 U.S. 478 (1964).....	40
Fendley v. United States, 384 F.2d 923 (5th Cir. 1967).....	30,31

Hampel v. State,
706 P.2d 1173
(Alaska Ct. App. 1985)..... 36

Johnson v. Commonwealth,
220 Va. 146,
255 S.E.2d 525 (1979)..... 40

Johnson v. Zerbst,
304 U.S. 458 (1938)..... 38

Lamb v. Commonwealth,
217 Va. 307,
227 S.E.2d 737 (1976)..... 45,46

Lathers v. United States,
396 F.2d 524
(5th Cir. 1968)..... 32

Michigan v. Mosley,
423 U.S. 96 (1973)..... 40

Miranda v. Arizona,
384 U.S. 436 (1966)..... 26,28,33
34,35,38,42,47

Nash v. Estelle,
597 F.2d 513
(5th Cir. 1979)..... 36

North Carolina v. Butler,
441 U.S. 369 (1980)..... 38

Oregon v. Elstad,
470 U.S. 298 (1985)..... 47

People v. Bodner,
75 App. Div. 2d 440,
430 N.Y.S.2d 433 (1980).... 51

People v. Rafac,
51 Ill. App.3d 1,
364 N.E.2d 991 (Ill. 197)... 32

Poyner v. Bair,
Record No. 870990,
Cir. Ct. No. L-20843-H.C.
(Va. Apr. 29, 1988)..... 11

Poyner v. Commonwealth,
229 Va. 401, 329 S.E.2d 815,
cert. denied 475 U.S. 865, 888
(1985)..... 11,25

Smith v. Illinois,
469 U.S. 91 (1984)..... 37

State v. Anspaugh,
97 Idaho 519,
547 P.2d 1124
(Idaho 1976)..... 45,46

United States v. Contreras,
667 F.2d 976
(11th Cir. 1982)..... 32

United States v. Riggs,
537 F.2d 1219
(4th Cir. 1976)..... 36

United States v. Twomey,
467 F.2d 1248
(7th Cir. 1972)..... 30

Windsor v. U.S.,
389 F.2d 530..... 20

(5th Cir. 1968)..... 30,31

Wong Sun v. United States,
371 U.S. 471 (1963)..... 50

Page

OTHER AUTHORITIES

28 U.S.C. § 1257..... 11

U.S. Const.
Fifth Amendment..... 13

U.S. Const.
Sixth Amendment..... 14

IV.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ Of Certiorari issue to review the denial of a writ of error to the petition for writ of habeas corpus by the Supreme Court of Virginia on April 29, 1988.

V.

OPINIONS BELOW

On June 13, 1984, in the Circuit Court of the City of Hampton, Poyner was convicted of two counts of capital murder, robbery, two counts of use or display of firearms in commission of a

felony, two counts of abduction, grand larceny, and rape. He was sentenced to death.

On April 26, 1985, the Virginia Supreme Court upheld the convictions and punishment. Poyner v. Commonwealth, 229 Va. 401 (1985). A pro se petition for a Writ Of Certiorari was denied by this Court on October 7, 1985. See Poyner v. Commonwealth, 475 U.S. 865,888 (1985). Poyner collaterally attacked these convictions through a petition for habeas corpus relief in the Circuit Court. This petition was denied when the Circuit Court granted the Commonwealth's motion to dismiss without an evidentiary hearing. On appeal, denial was upheld by the Virginia Supreme Court. Poyner v. Bair, Record

No. 870990, Cir. Ct. No. L-20843-H.C. (Va. Apr. 29, 1988).

This petition for certiorari to this court seeks review of the state court's denial of Poyner's habeas corpus petition.

VI.

JURISDICTION

Petitioner seeks review of the Supreme Court of Virginia's denial on Friday, April 29th, 1988, of his habeas corpus petition.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

VIII.

STATEMENT OF THE CASE

Syvasky L. Poyner (Poyner) was arrested on Saturday, February 4, 1984 at approximately 1:00 A.M. at his home in the City of Newport News and charged

with the murder of Carolyn Hedrick.[1] Poyner's arrest occurred approximately 10 minutes after he arrived home from "Sonny's," a local bar, where he had been drinking heavily since that afternoon. Poyner did not eat from the time of his visit to Sonny's until he was in police custody.[2] At the time of his arrest, Poyner had an intelligence level that put him in the bottom fifth to eighth percentile of the population. (A 174.)

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[1] Appendix, p. 194 (hereafter (A _____). Except where noted, the facts contained in this petition are taken from testimony and documentary evidence admitted in the proceedings against Petitioner in Williamsburg, Hampton and Newport News on the capital murder charges.

[2] (A 174.) Facts concerning Poyner's whereabouts before his arrest are set forth in his Petitions for Writs of Habeas Corpus.

He was taken to the Newport News Police Department (NNPD) headquarters, where Detective C. D. Spinner (Spinner) and Hampton Police Department (HPD) Detective Edgar A. Browning (Browning) took custody of Poyner and advised him of his rights in the following words:

> (1) You have the right to remain silent, (2) Anything you say can and will be used against you in a court of law, (3) You have the right to have an attorney present before any questioning if you wish one, (4) If you cannot afford an attorney, the court is empowered to appoint one to represent you. (Emphasis added.)

(A 196.)

At one point during the course of these events early on February 4, Poyner was informed by the police that he would have to wait until Monday before he could get an attorney. Poyner then and

thereafter believed he could not get an attorney until, and if, the Court appointed one on Monday. (A 99.) Spinner's rendition of the Miranda rights either negligently or purposefully fostered this view by the words "If you cannot afford an attorney, the Court is empowered to appoint one for you."

Poyner appeared before a magistrate and was returned to the third floor detective bureau at about 1:50 a.m. at which time he was again advised of his rights in the same incorrect manner. This was the second and last time any statement of rights was given Poyner during this early morning interrogation. The warning was oral and the police did not obtain a written rights waiver.

Spinner immediately began interrogating Poyner about whether he had stolen Hedrick's car. Spinner told Poyner that several witnesses had already seen Poyner driving Hedrick's car. Spinner then threatened to confront Poyner with these people if he refused to talk to the police. In the words of the written police report:

> [Detective Browning] then told Mr. Poyner if he wanted his friends from the barber shop to have to come to court and tell what they knew about him and the Oldsmobile and candy, that he would be the one that would have to face them.

In response to this threat, Poyner invoked his right to counsel, stating "didn't you tell me I had the right to

an attorney?"[3] Spinner acknowledged Poyner's right, by acting as though the questioning would end.

Faced with the dilemma of having no access to counsel before Monday,

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[3] (A 198.) The entire exchange between the detective and Poyner, as recorded in the police report. (A 194.)

It is clear that the detectives understood that Poyner was asserting his right to counsel. As soon as Poyner said "Didn't you tell me I had the right to an attorney?" Spinner and Browning got up out of their chairs to terminate the interrogation. Later, at the next interrogation session, at approximately 6:00 a.m., Spinner began the session with the following dialogue:

Spinner:	O.K., what I'm going to do right now Lafayette, is that what you want to be called?
Poyner:	Yes.
Spinner:	Lafayette, what I'm going to ask you right now, I'm going to advise you of your constitutional rights and I

(Footnote Continued)

February 6, but expecting an imminent confrontation with hostile witnesses, Poyner blurted out "Let me tell you about the car." After Poyner gave a limited explanation of giving a man some

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(Footnote Continued)

want to make sure that you understand them. You understood your rights earlier this morning, correct?

Poyner: Right.

Spinner: After I advised you of your rights back around 0100 this morning. . .

Poyner: Right.

Spinner: You told me you wanted to talk to a lawyer.

Poyner: That's correct.

Spinner: But as you was getting up from your chair, you says, "Wait a minute. I'd like to talk to you and tell you

(Footnote Continued)

candy from the car, the detectives resumed their interrogation with the question "Did you kill her?" (A 198.) Nothing more was said concerning Poyner's request for counsel.

(Footnote Continued)

about the murder I did on 43rd Street." Correct?

Poyner: Correct.

Spinner: Knowing that your rights was in mind, and that you had stated that you wanted to talk to a lawyer, at that time, you stated that you wanted to go ahead and tell me about that murder anyway, and you stopped and voluntarily told me this, correct?

Poyner: Yes sir.

(A 183-90.) (Emphasis added.)

After a brief confession to one murder,[4] Poyner explicitly invoked his right to remain silent by stating "that's all I want to say about it." The police report further notes that "talking about the incident seemed to upset the defendant." (A 199.) Poyner's invocation of his right to remain silent was ignored, just as his request for counsel had been ignored. Spinner and Browning continued their questioning as if Poyner had not spoken.

Based in part on Poyner's statements made after invoking his right

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[4] At this point the detectives were concerned only with the Hedrick murder and had not associated Poyner with other offenses. Poyner was not questioned, at this time, regarding the Williamsburg, Newport News or other Hampton murders.

to counsel, Spinner obtained a warrant to search Poyner's apartment.

After about an hour of interrogation, Spinner and Browning forced Poyner to accompany them as they searched for Hedrick's purse and the murder weapon. This search was precipitated by Poyner's misleading statements regarding the location of the purse and murder weapon.

At 5:30 a.m., the police returned with Poyner to NNPD headquarters and questioned him concerning a gun they found during the search of his room. At this point, Poyner had been in the constant company of Browning and Spinner throughout the night with no chance to sleep or eat. The detectives then began to interrogate Poyner regarding the Williamsburg, Newport News and other

Hampton murders. Poyner was not advised of his Miranda rights at this time. Poyner was told that if he knew anything about the Hampton and Williamsburg murders that he should tell the detectives "now." Poyner responded, "I did them all." (A 203.) The detectives then took a taped statement from Poyner, in which Detective Spinner began by referring to Poyner's earlier statements on the Hedrick murder in Hampton and led directly and without interruption into interrogation on the four other murders. This interrogation concluded at approximately 6:28 a.m., February 4. (A 204.)

At approximately 8:50 p.m., on Saturday evening, February 4, 1984, Poyner executed a "rights waiver form" and the detectives made a videotape of

Poyner's confession to the murders in Newport News, Hampton and Williamsburg.

Petitioner moved to suppress the confession and such motion was denied. (A 13.) Petitioner thereafter appealed and the Supreme Court rejected his contention and affirmed his conviction. Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied, 475 U.S. 865,888 (1985). (A 1.) Thereafter, petitioner raised this claim in his petition for writ of habeas corpus filed in the Circuit Court of Hampton. (A 154.) The Circuit Court granted respondent's motion to dismiss Poyner's petition. (A 169.) Poyner petitioned for an appeal to the Supreme Court of Virginia and assigned as error the Circuit Court's failure to grant him a hearing on this claim. (A 191.) The

Supreme Court denied Poyner's petition. (A 103.)

IX.

REASONS FOR GRANTING THE WRIT

A. Poyner Was Never Properly Advised Of His Constitutional Right To Have A Lawyer Present Prior To Interrogation

The inherently intimidating atmosphere of custodial interrogation requires adequate protective measures to safeguard the suspect's privilege against self-incrimination. Chambers v. Florida, 309 U.S. 227 (1940). These procedural safeguards must be effective to secure the Fifth Amendment's privilege against self incrimination. The Court in Miranda v. Arizona, 384

U.S. 436 (1966), outlined safeguards which must be observed during custodial interrogation.

1. The accused must be informed in clear and unequivocal terms that he has the right to remain silent. Id. at 468.

2. The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in Court. Id. at 469.

3. An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer, and to have a lawyer with him during interrogation. Id. at 469.

4. If the accused cannot afford a lawyer, the accused must be informed

that a lawyer will be provided for him prior to interrogation. Id. at 474.

In order to inform a suspect of the extent of his rights, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent, a lawyer will be appointed to represent him. Miranda, 384 U.S. at 472. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of his right, can there be assurance that he was truly in a position to exercise that right. The Miranda warnings given in this case were not an "effective and express" explanation of appellant's constitutional rights.

Although Poyner was advised that he had the right to have an attorney present before any questioning, that warning was diluted by the vague statement that "the court is empowered to appoint one to represent you." The precise language of the warnings given is as follows:

> "You have the right to remain silent, anything you say can and will be used against you in a Court of law. You have the right to have an attorney present before any questioning, if you wish one. If you cannot afford an attorney, the Court is empowered to appoint one to represent you." (Emphasis added.)

(A 196.)

1. The Clear Implication Of The Warning Actually Given Was That Poyner's Right To Counsel Would Only Attach At A Future Time

The Miranda warning given Poyner was constitutionally deficient. It gave the impression that Poyner's right to counsel would not be triggered until a future event occurred. A natural reading of the rights read to Poyner was that if Poyner could afford an attorney, he could have one present prior to questioning. If, on the other hand, Poyner was indigent, he would not get an attorney until later.

Miranda warnings that restrict the absolute right to counsel or make the right contingent upon some future event are improper and render subsequent confessions inadmissible. U.S. v. Twomey, 467 F.2d 1248 (7th Cir. 1972); Windsor v. U.S., 389 F.2d 530 (5th Cir. 1968); Fendley v. United States, 384 F.2d 923 (5th Cir. 1967). The

confessions in both Fendley and Windsor were excluded.[5] The warning used here, as in Fendley and Windsor, substantially restricted the absolute right to counsel. Such inadequate warnings constitute a subtle temptation to an unsophisticated indigent individual to forego his right to counsel at a critical moment.

The Miranda warning must effectively convey to the accused that

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[5] In Windsor, the police told the accused "he could speak to an attorney or anyone else before he said anything at all." 389 F.2d at 532. This was "not the same as informing him that he [was] entitled to the presence of an attorney during interrogation and that one will be appointed if he cannot afford one." Id. at 533. In Fendley the police told the accused "if he did not have the money to obtain an attorney that the Judge, the Court, would appoint one for him when he went to court." 384 F.2d at 923.

he is entitled to counsel before questioning. If the words are subject to the construction that such counsel will be available in the future, Miranda has not been obeyed. Although there is no strict formula, the offer of counsel must be clear and firm, not one of impression. Lathers v. United States, 396 F.2d 524, 555 (5th Cir. 1968). But see, United States v. Contreras, 667 F.2d 976 (11th Cir. 1982). It is not proper for the police to discourage an indigent prisoner from exercising his right to have an attorney present during interrogation by telling the prisoner one will be appointed for him by the Court, but at some later time. People v. Rafac, 364 N.E.2d 991 (Ill. 1977). Indeed, the warning of a right to counsel would be hollow if not couched

in terms that would convey to the indigent, "the person most often subjected to interrogation -- the knowledge that he too has the right to have counsel present." Miranda v. Arizona, 86 S. Ct. at 1602.

2. The Clear Implication Of The Warning Actually Given Was That Poyner's Right To Have Counsel Appointed Was Discretionary With The Court

Another flaw in the warning given Poyner lies in the use of the word "empowered." By telling Poyner that if he could not afford an attorney the Court was empowered to appoint one for him, the police improperly implied that whether to give Poyner an attorney was discretionary with the Court. The doubt created in Poyner's mind by the erroneous reading of his rights

effectively foreclosed any knowing intelligent voluntary waiver of his rights.

B. Poyner's Invocation Of His Right To Counsel Was Ignored By The Police

When an "individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. at 474; Edwards v. Arizona, 451 U.S. 477 (1981). The right to counsel must be scrupulously honored and no subsequent interrogation is valid unless the suspect voluntarily, knowingly and intelligently waives his earlier request. Edwards, 451 U.S. at 484-85. This Court has defined a request for counsel as "any indication in any manner at any stage of the process that he

wishes to consult with an attorney." Miranda, 384 U.S. at 444.

In consideration of the totality of the circumstances, it is wholly unreasonable to conclude that Petitioner's statement "Didn't you tell me that I had the right to an attorney?" was anything other than an unequivocal assertion of his right to counsel. The circumstances were that Poyner was in custody, held without bond, in the middle of the night, facing questioning by two experienced detectives who let Poyner know they had witnesses linking him to the murder victim's car. Poyner asked for an attorney. Given the further circumstances that Poyner has a low intelligence level, had been drinking alcoholic beverages, and had little food or sleep, his statement

should have been interpreted as the unequivocal request for counsel that it was.

Even if Poyner's statement was not a clear request for counsel, the police were obligated to clarify an ambiguous request before continuing with the interrogation. United States v. Riggs, 537 F.2d 1219 (4th Cir. 1976). See also Hampel v. State, 706 P.2d 1173 (Alaska Ct. App. 1985); Carter v. State, 702 P.2d 826 (Idaho 1985); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979). No such inquiry or clarification was made.

C. Poyner Did Not Voluntarily, Knowingly Or Intelligently Waive His Right To Counsel

Once a suspect invokes his right to counsel, no subsequent statements can be used unless the court finds that the suspect: (a) initiated further

discussions with the police; and (b) knowingly and intelligently waived the right he had invoked. Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam). A valid waiver cannot be established by showing only that the suspect responded to further police-initiated interrogation. Id. at 98; See also Edwards v. Arizona, 451 U.S. at 484. "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Id. at 476. After an unambiguous request for counsel, responses to further interrogation may not be used to cast doubt on the clarity of the initial request for counsel. Smith v. Illinois, 469 U.S. at 98.

After warnings have been given, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. Miranda, 384 U.S. at 418. However, courts indulge every reasonable presumption against waiver of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused. Zerbst, 304 U.S. at 464; North Carolina v. Butler, 441 U.S. 369 (1980).

In the present case Poyner did not comprehend the meaning and importance of

his constitutional rights. Therefore he could not make a knowing, intelligent, and voluntary waiver of them. In Poyner's perception of the pre-interrogation procedure, he was not entitled to an attorney until some future point. This perception, coupled with the fact that Poyner asked whether he had a right to an attorney before making any damaging statement, shows that he did not understand the meaning and importance of his rights.

An attorney appointed to represent Poyner on another case who saw him Monday, February 6, testified on cross-examination that Defendant told him that when Defendant asked the police about his right to an attorney he was told he would have to wait until Monday. That was "(h)is perception of what was

said . . . early Saturday morning . . . at the police station." (A 100-01.)

Petitioner's assertion of his constitutional rights was not "scrupulously honored" as mandated by Michigan v. Mosley, 423 U.S. 96 (1973) and his statements should not have been held admissible. The guiding hand of counsel was essential to advise Petitioner of his rights in this situation. This was a stage where legal assistance and advice were critical to preserving Petitioner's constitutional rights. Escobedo v. Illinois, 378 U.S. 478 (1964); Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979).

Petitioner's limited remark "let me tell you about the car" was not a waiver of his right to counsel or his right to remain silent. Poyner's

statement was a specific response to the detective's threat that witnesses had seen Poyner in Hedrick's car. It was not an open-door remark, and not a general initiation of a dialogue with the police.

In addition, Poyner did not waive his right to counsel because his remarks were the product of police coercive tactics. The psychological pressure exerted on Petitioner by the direct threat of having to confront his friends was intentional and coercive. In Edwards v. Arizona, the Court placed significant weight on a police statement to the suspect that he "had to talk" in rejecting a waiver argument. That police admonition is functionally equivalent to the coercive threat of confrontation with Petitioner's friends

in this case. A police concession to a suspect implying that the police will go along with the suspect's request for counsel, as in this case, is one aspect of psychological conditioning and a police technique recognized as coercive. Miranda v. Arizona, 384 U.S. at 453-54. Petitioner did not "initiate" a general discussion nor did he waive his rights.

D. Poyner's Invocation Of His Right To Remain Silent Was Ignored By The Police

During the initial interrogation, Poyner not only asked for an attorney, he attempted to stop the interrogation by asserting, unequivocally, his right to remain silent. Under the totality of the circumstances, particularly given his attempt to assert his right to counsel, Poyner's statement "That's all I want to say about it" was clearly an

assertion of the right to remain silent. Notwithstanding this clear statement, the detectives pressed on with the interrogation.[6] In response, Poyner gave false statements seeking to elude the pressure to confess. For example, Poyner fabricated a story about throwing the gun off "Red's Pier" resulting in a futile search in the river. (A 203.) Short of utter silence in response to the continuing interrogation, no conduct could be more indicative of a lack of voluntary waiver than this failure to cooperate.

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[6] There is no waiver issue with respect to the assertion of the right to silence. The police report shows that after Poyner said "That's all I want to say about it," it was the detectives, not Poyner, who initiated further conversation.

In Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975), defendant's statement "Do I have to talk about it now?" is not the equivalent of Poyner's statement "That's all I want to say about it." In Akers the defendant had been correctly warned of his Miranda rights, and had already given a substantive confession which he was in the process of repeating after signing a written waiver form, when he impatiently asked "Do I have to talk about it now?" Importantly, the detectives in Akers did not continue with a substantive interrogation, but proceeded to conduct a noncoercive, nondeceitful questioning. Id., 216 S.E.2d at 32. The result of this limited questioning was a clarification that the defendant was not asserting his right to remain silent.

In Lamb v. Commonwealth, 217 Va. 307, 227 S.E.2d 737 (1976) the defendant, in the course of being read his Miranda rights, expressed a reservation about giving a statement based on past experience of having other statements misunderstood and misinterpreted. Id., 227 S.E.2d at 741. The police, in a "logical and proper response to Lamb's comment" clarified the fact that defendant was not asserting his constitutional rights. Id.

Likewise in State v. Anspaugh, 97 Idaho 591, 547 P.2d 1124 (Idaho 1976) the defendant's comment "I'd rather not make any other comments at this time," was found to be a reluctance to answer further questions about a particular aspect of the case. Id. at 1137. The

interrogating officer ceased the substantive questioning and clarified the fact that it was the defendant's "reluctance related to this particular area [of questioning]." The record did "not show any reluctance on defendant's part to pursue other lines of questioning." Here the detectives did not try to clarify what Poyner's assertion meant -- they pressed on, utterly ignoring Poyner's repeated attempt to protect himself.

Unlike Akers, Lamb, and Anspaugh, the police attempted no clarification of Petitioner's request.

E. The Court Below Applied Improper Constitutional Standards in Affirming The Admissibility of the Videotaped Confession

As discussed above, Petitioner's oral admissions during police

interrogation were involuntary and therefore, inadmissible. See Miranda v. Arizona, 384 U.S. 436. The next question is whether the later videotaped confession which was preceded by the execution of a written rights waiver form should also be excluded.

In this case, Petitioner's later admission was preceded by his execution of a written rights waiver form. Even though Petitioner executed a written rights waiver form and was advised of his constitutional rights under Miranda v. Arizona, the simple execution of a written rights waiver form is not sufficient to render this later admission properly admissible. In Oregon v. Elstad, 470 U.S. 298 (1985), this Court held that when a prior admission was not voluntary, the Court

should examine other factors as delineated in pre-Elstad caselaw. Id., 470 U.S. at 310.

Petitioner's later videotaped confession was simply the culmination of the interrogation process which began with the improperly obtained confession. Petitioner was asked no new questions during the videotaped interrogation. Upon reviewing the videotape or the transcript, it is clear that Petitioner was simply repeating the answers that he had given previously. Petitioner failed to give any narration during his answers and simply responded in an automatic rote fashion. The prosecution failed to show that under the totality of the circumstances, there was a sufficient break in the stream of events so that the subsequent videotaped confession was

sufficiently distant from the initial involuntary confession so that Petitioner was capable of making an informed and voluntary waiver of his rights under the Fifth Amendment.

This Court has held that when an initial confession has been in violation of the accused's rights under the Fifth Amendment, any subsequent confessions may be admitted only if the prosecution demonstrates that under the totality of the circumstances there has been a "break in the stream of events" that sufficiently isolates the subsequent confession from the damaging influence of the first. See Darwin v. Connecticut, 391 U.S. 346, 349 (1968). In other words, even though subsequent confessions under the circumstances are not per se inadmissible, the prosecution

carries the burden of demonstrating that the initial tainted confession did not operate to extract the subsequent confession. See Clewis v. Texas, 386 U.S. 707 (1967).

The court's reasoning in these cases recognizes that an improperly obtained confession exerts certain psychological pressures upon the accused so that any subsequent confession shares the constitutional illegality of the first unless there has been a true act of free will on the accused's part before the later confession. See Wong Sun v. United States, 371 U.S. 471 (1963). In addition, if the subsequent admission is simply a recapitulation of the prior tainted admission preceded by the giving of the Miranda warning, the "written form could not undo what had

been done or make legal what was illegal." People v. Bodner, 75 App. Div. 2d 440, 448, 430 N.Y. S.2d 433, 438 (1980).

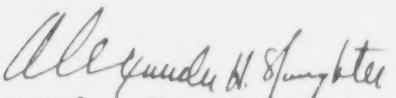
Petitioner respectfully contends that the court below has committed a grave error in its constitutional analysis of this issue.

X.

PRAYER FOR RELIEF

For the reasons stated, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Alexander H. Slaughter, certify that I mailed first class, postage prepaid, three (3) copies of this Petition for Writ of Certiorari to Richard B. Smith, Assistant Attorney General, Supreme Court Building, 101 North 8th Street, Richmond, VA 23219, counsel of record for respondent below, on this the 28th day of July, 1988.

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Table of Contents For Appendix

* Poyner v. Commonwealth, 229 VA. 401, 329 S.E.2d 815 (1985)..... 1-96

* Transcript of Proceedings on Preliminary Motions in the Circuit Court for City of Newport News..... 97-101

* Supreme Court of Virginia's Order refusing Poyner's petition for appeal from the Circuit Court of the City of Williamsburg and County of James City..... 102

* Supreme Court of Virginia's Order refusing Poyner's petition for appeal from the Circuit Court of the City of Hampton..... 103

* Supreme Court of Virginia's Order refusing Poyner's petition for appeal from the Circuit Court of the City of Newport News..... 104

* Final Order Dismissing Poyner's Petition for Writ of Habeas Corpus in the Circuit Court for the City of Williamsburg and James City County.....105-133

* Final Order Dismissing Poyner's petition for Writ

of Hebeas Corpus in the Circuit Court for the City of Newport News.....134-152

* Final Order Dismissing Poyner's Petition for Writ of Habeas Corpus in the Circuit Court for the City of Hampton.....153-170

* Motion to Suppress In the Circuit Court for the City of Williamsburg and the County of James City... 171

* Motion to Suppress In the Circuit Court for the City of Hampton.....172-173

* "Supporting Facts" in Petition for Writ of Habeas Corpus in Williamsburg (Paragraphs 43, 44, 45, 46) and in Hampton and Newport News (Paragraphs 24, 25, 26, 27,).....174-176

* "Supporting Facts" in Petition for Writ of Habeas Corpus in Newport News (Paragraphs 39-48, 50, 51).....177-182

* Police Report 2/2/84.....183-

APPENDIX

SYVASKY LAFAYETTE POYNER
v.
COMMONWEALTH OF VIRGINIA

Record Nos. 841434, 841435,
841539, 841540 and 841589

The Supreme Court of Virginia
(Decided April 26, 1985)

THOMAS, J., delivered the opinion of the Court.

I. Background

In three separate trials, Syvasky Lafayette Poyner was convicted of the capital murders of five women. He was sentenced to death for each offense. The five death sentences are before the Court pursuant to the automatic review provision of Code § 17-110.1. We have consolidated Poyner's appeals of his convictions with our automatic review of

his death sentences and have given the cases priority on the docket.

The five women were killed in an eleven-day period in late January and early February 1984. All were shot in the head. The murders occurred in the Hampton-Williamsburg-Newport News area of Virginia.

Poyner was arrested in Newport News on February 4, 1984, as part of the investigation into the murder of a Hampton woman. He was taken to the Newport News detective bureau where he was served with a warrant charging him with the Hampton murder.

Before any questioning, a Newport News detective, C.D. Spinner, orally advised Poyner of his Miranda rights. The warning given to Poyner was essentially as follows:

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to have an attorney present before any questions.

If you cannot afford an attorney, the Court is empowered to appoint one for you.

Spinner next asked Poyner whether he understood his rights. Poyner said he did. Spinner then summarized the evidence against Poyner regarding the murder of the Hampton woman for which Poyner had been arrested. Spinner asked Poyner whether he had anything to say. Poyner responded by asking, "Didn't you tell me I had the right to an attorney?" Spinner replied, "Yes, you have the right to an attorney." At that point Spinner and another detective, who was present during the exchange, made a

motion to stand up. Poyner then spontaneously said, "Let me tell you about the car," a reference to an automobile which the police contended linked Poyner to the Hampton murder. The other detective, Edgar Browning of the Hampton police, then asked Poyner, "Did you kill her?" Poyner said, "Yes." Thereafter, Poyner confessed to five murders: the killings of Clara Paulette and Chestine Brooks in Williamsburg (the Williamsburg Case), the killings of Joyce Baldwin and Carolyn Hedrick in Hampton (the Hampton Case), and the killing of Vicki Ripple in Newport News (the Newport News Case). Approximately fourteen hours after Poyner's initial confession, he signed a rights waiver form and confessed again on videotape to five murders.

We will separately develop the facts of each case during the discussion of the separate appeals. At the outset, however, we will dispose of certain threshold or pre-trial matters raised in the appeals.

II. Threshold and Pre-Trial Matters

A. Constitutionality of the Death Penalty

[1] In the Williamsburg and Newport News cases, Poyner attacks the constitutionality of the Virginia capital murder statute. In both cases Poyner readily admits that this Court has previously considered the matter and has consistently ruled that the statute is constitutional. Poyner raises no arguments that have not already been carefully considered. We reject his constitutional attacks. The Virginia

capital murder statute is constitutional. See Zant v. Stephens, 462 U.S. 862 (1983); Edmonds v. Commonwealth, 229 Va. 303, 329 S.E.2d 807 (1985) (this day decided).

B. Adequacy of the Oral Miranda Warning and Admissibility of Poyner's Confession

In each appeal, Poyner complains either that the oral Miranda warning was defective or that for other reasons his confession should have been suppressed. Because of the slightly different approaches taken in each appeal, we will treat the arguments as they arose in the separate cases.

1. Miranda Issue: The Williamsburg Case

a. The Initial Confession Following the Oral Warning

Poyner contends that his initial confession, following the oral Miranda warning, should have been suppressed because the warning was defective. He contends further that the videotaped confession which followed his execution of written rights waiver form should have been suppressed because it was the fruit of the tainted original confession. Both contentions are without merit.

The oral warning is set out in full above. On brief, Poyner says the warning was defective because it was "so vague as to beg the question as to when the Court would appoint Poyner a lawyer

. . . ." In oral argument, Poyner admitted he had been advised of the right to counsel prior to questioning but said he was not told that if he could not afford a lawyer, one would be appointed prior to questioning.

[2] Further, during oral argument, Poyner admitted that in determining the adequacy of the warning, the statement to the defendant must be considered as a whole. Moreover, he conceded that Miranda v. Arizona, 384 U.S. 436 (1966), contains no "iron-clad requirements" concerning the language that must be used to convey to defendant his rights under the Fifth Amendment.

[3] In essence, Poyner contends the oral warning would have been sufficient had the last warning repeated a phrase previously stated in the series of

warnings. The critical defect, in Poyner's view, is shown by the following comparison of what was said with what Poyner contends should have been said:

Portion of Actual Warning

> You have the right to have an attorney present before any question.
>
> If you cannot afford an attorney the Court is empowered to appoint one for you.

Suggested Warning

> You have the right to have an attorney present before any questions.
>
> If you cannot afford an attorney the Court is empowered to appoint one for you prior to any questioning.

Poyner argues that without the italicized language, the warning was defective. We think not.

The language which Poyner says was essential to his understanding of his rights is redundant. Miranda does not

require such redundancy. That opinion contains no prescription as to the words that must be used in warning a defendant. See Miranda, 384 U.S. at 467. Here, taking the warning as a whole, it is clear that defendant was advised he had the right to the appointment of counsel prior to any questioning.

In support of his argument that the oral warning was defective, Poyner cites Biggerstaff v. State, 491 P.2d 345 (Okla. Crim. App. 1971). That case does not support his argument. Biggerstaff did not concern a contention that the defendant was not made aware of his right to the appointment of an attorney prior to questioning. Biggerstaff was concerned with whether the defendant was made aware that he had the right to the

presence of his attorney during questioning. Id. at 352.

b. The Videotaped Confession Following Execution of the Written Rights Waiver Form

[4] Even if the oral warning had been defective, the confession following the written warning would still have been constitutionally sufficient. This is the lesson of Oregon v. Elstad, 105 S.Ct. 1285 (1985), where the Supreme Court considered the precise issue raised here by Poyner. There, defendant, while in a custodial setting, made an unwarned, inculpatory statement in response to a question from a police officer. One hour later, defendant was fully advised of his rights; he said he wished to make a statement. He confessed to a crime under

investigation. There was no claim that the second confession was coerced under threats or promises. Defendant moved to suppress the second confession on the ground that it was the tainted fruit of the first confession. The Court rejected that argument stating as follows:

> It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

105 S.Ct. 1293-94. The Court went on to hold that "a suspect who has once responded to unwarned yet uncoercive

questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." 105 S.Ct.

2. Miranda Issue: The Hampton Case

a. Adequacy of the Warning

Here, Poyner contends the oral Miranda warning was not "effective and express" but instead was "equivocal and ambiguous" because, in his view, the logical conclusion that a defendant would draw from the oral warning given here is that "he must wait until the Court can get an attorney appointed; which will be some time in the future." The gravamen of Poyner's attack, in the Hampton Case, is that he was not told he had the right to the immediate appointment of counsel. He argues on brief that "[t]he Miranda warning must

effectively convey to the accused that his is entitled to counsel immediately. If the words are subject to the construction that such counsel will be available in the future, Miranda has not been obeyed." (Emphasis added.) Though this argument differs from that made in the Williamsburg Case, it is equally without merit.

[5] Miranda nowhere requires that a suspect be told he has the right to the immediate appointment of counsel. Indeed, language in Miranda negates this very proposition:

> If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
>
> This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners.

384 U.S. at 474 (emphasis added). It is a mistake to read Miranda to mean that a suspect has the right to the immediate appointment of counsel. The import of Miranda is that once a suspect asks for counsel, the police cannot interrogate him until counsel has been appointed. This is an important distinction which Poyner has not grasped. The mere fact that the oral warning given to Poyner did not advise him of the right to have counsel appointed immediately, does not render the warning defective. See United States v. Contreras, 667 F.2d 976 (11th Cir. 1982); Wright v. State, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974); State v. Maluia, 56 Hawaii 428, 539 P.2d 1200 (1975); Emler v. State, 259 Ind. 241, 286 N.E.2d 408 (1972).

In support of the argument that he should have been told he had a right to the immediate appointment of counsel, defendant relies upon United States ex rel. Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1968). Those cases appear to stand for the proposition for which they are cited by Poyner. However, in our opinion, they were at odds with the spirit and letter of Miranda and thus are not persuasive.

b. Whether Defendant Requested Counsel

In the Hampton Case, defendant makes the additional argument that he requested counsel but that his request was not scrupulously honored. This argument is based on Poyner's misunderstanding the facts.

According to defendant, after he received his oral Miranda warning he

asked the detectives, "Do I have a right to an attorney?" Then, according to defendant, the officers began to stand up but paused to inform Poyner that they knew about his involvement in the Hedrick murder because Poyner "had been seen in the 600 block of 25th Street in reference to some candy." At that point, according to Poyner he said, "Let me tell you about the car."

[6] The actual facts are different. After the oral Miranda warning, the officers summarized the information linking Poyner to the Hedrick murder. After the information had been summarized Poyner asked, "Didn't you say I have the right to an attorney?" The officers said, "Yes." They then made a motion to stand up. At that point

Poyner spontaneously said, "Let me tell you about the car."

Poyner's statement was not a request for counsel. See Bunch v. Commonwealth, 225 Va. 423, 430, 304 S.E.2d 271, 275, cert. denied, 464 U.S. 977 (1983). At most, it sought to clarify one of the rights of which he had already been advised. The detectives did all they were required to do when they reaffirmed defendant's right to counsel by answering "yes" to his question.

In addition, even if Poyner's question could be interpreted as a request for counsel, his confession would still be valid. This is so because it was Poyner who initiated further communication with the detectives. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

3. Miranda Issue: The Newport News Case

In the Newport News Case, Poyner makes three arguments concerning the confession which followed the oral Miranda warning. First, he says the warning was defective because he was not advised of his right to have a lawyer appointed prior to questioning. This identical argument was made in the Williamsburg Case. For the reasons stated above it must be rejected.

Second, Poyner argues that he invoked his right to counsel but his request for counsel was not honored. This same argument was made and rejected in the Hampton Case. For the reasons stated above we find no merit in this argument.

[7] Third, Poyner contends, in essence, that his will was overborne and that, as a result, his confession was not voluntary. We disagree. The basis for this contention is that Poyner did not want the detectives to tape or write down his initial confession and that he was in custody twelve days without any representation on the charge of murdering Ripple. The facts pointed to by Poyner fall far short of establishing that his will was overborne. See Rodgers v. Commonwealth, 227 Va. 605, 318 S.E.2d 298 (1984). Poyner's confession was voluntary.

C. Sufficiency of the Search Warrant

1. Description of Plan to be Searched

Poyner rented a room in a private home. The police searched that room pursuant to a warrant which gave the

address of the house. In the Williamsburg and Hampton cases, Poyner contended that the search warrant was defective in that it did not describe with particularity the place to be searched. In both cases, Poyner argued that the warrant should have been directed at his room in the house and not at the house. This argument is without merit.

The evidence in both cases established that though Poyner rented a room he had the "run of the house." He routinely used both entrances to the house. The house had one bathroom, one kitchen, and one living room, all of which were open to Poyner's use.

[8] Poyner relies upon Brown and Larson v. Commonwealth, 212 Va. 672, 187 S.E.2d 160 (1972), and Manley v.

Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970), cert. denied, 403 U.S. 936 (1971). Those cases stand for the proposition that where a search warrant is directed to a multiple occupancy structure, it must "describe the particular sub-unit to be searched." 211 Va. at 151, 176 S.E.2d at 314. Those cases have no application here. Poyner did not live in a sub-unit within a multiple occupancy structure. He lived in a private home.

2. Basis for the Search Warrant

In the Newport News Case, Poyner attacked the search warrant on the ground that it was issued based on his initial confession. He submits that since, in his view, his confession should have been suppressed the search warrant based on that confession should

have been quashed. This argument must fail because, as stated above, the confession was proper.

D. Sufficiency of the Arrest Warrant

In the Newport News Case, Poyner attacked his arrest warrant on the ground that it was issued based on his initial confession. His argument on this point parallels that made in the Newport News Case concerning the search warrant. This argument must fail for the same reason: the confession was proper.

E. Motion for Continuance

[9] In the Williamsburg Case, on the day of trial, Poyner moved for a continuance on the ground that certain inmates on death row in Virginia had recently escaped from prison. Poyner argued that the publicity surrounding

the escape "created an atmosphere unfair to the rights of Poyner."

The trial court denied the motion. However, the court advised counsel that it would examine the jurors to determine whether they could hear the case without being influenced by the escape. In addition, the court offered to instruct the jurors on the need to consider the case without being influenced by the escape. As Poyner acknowledges, the decision to grant or deny a continuance lies in the sound discretion of the court and will not be reversed on appeal absent an abuse of that discretion. Gilchrist v. Commonwealth, 227 Va. 540, 545, 317 S.E.2d 784, 787 (1984); Van Sant v. Commonwealth, 224 Va. 269, 275, 295 S.E.2d 883, 887 (1982). Here, we find no abuse of discretion.

F. Proceedings on Voir Dire

In the Williamsburg and Newport News cases, Poyner raises several questions concerning the examination of prospective jurors regarding their views on the death penalty and the exclusion of certain jurors because of their views. Poyner contends that the jury in the Williamsburg Case was unconstitutional in its makeup. We disagree. We address each of Poyner's contentions below.

1. Questions Regarding Views on the Death Penalty

[10] Poyner submits that asking prospective jurors their views on the death penalty and then excluding those opposed to the death penalty violates his constitutional rights because such a procedure results in an unrepresentative

jury that is biased in favor of conviction. We disagree.

In Waye v. Commonwealth, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, cert. denied, 442 U.S. 924 (1979), defendant argued that the use of "death qualifications" questions was improper because it resulted in an unrepresentative jury biased in favor of the Commonwealth. We rejected defendant's argument on the ground that since Witherspoon v. Illinois, 391 U.S. 510 (1968), permitted the exclusion of a juror opposed to the imposition of the death penalty, it could not be "constitutional error to inquire into his beliefs concerning capital punishment." 219 Va. at 691, 251 S.E.2d at 207. We adhere to what we said in Waye. See LeVasseur v. Commonwealth,

225 Va. 564, 576, 304 S.E.2d 644, 650 (1983), cert. denied, 464 U.S. 1063 (1984).

In addition to what we said in Waye, we reject Poyner's bias argument for yet another reason. The so-called death-qualified jury is merely a jury which can and will apply the law as set forth in the court's instructions -- even if the death penalty may ultimately result. The jury Poyner would have the court empanel would contain members who would not obey the law as set forth in the court's instructions. Poyner contends the first jury is biased while suggesting that the second jury is not. We disagree. We think the biased jury is the one which includes members whose views against capital punishment are such that in order to guard against the

imposition of a death sentence they would disregard the law. Poyner, in essence, seeks a jury comprised of members most likely to find him not guilty. He has no due process right to such a jury. See Briley v. Booker, 746 F.2d 225 (4th Cir. 1984); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). But see Grigsby v. Mabry, No. 83-2113 (8th Cir. Jan. 30, 1985) (en banc).

We also reject Poyner's claim that the exclusion of jurors opposed to the death penalty results in an unrepresentative jury, in violation of the Sixth Amendment. The Commonwealth has the right to insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38, 45 (1980). A

juror opposed to the imposition of the death penalty is not impartial. This is so because he or she would be unwilling or unable to follow the law. Such a juror might attempt to undermine the proper functioning of the courts by engaging in jury nullification. Thus, such a juror can be excluded from a jury panel without violating the defendant's right to a fair and impartial jury. See Briley, 746 F.2d at 226-27; Keeten, 742 F.2d at 133-34.

2. Obligation of Trial Court to Ask Questions Proposed by Counsel

In the Williamsburg Case, prior to voir dire, Poyner submitted the following question to be propounded to the members of the venire: "Do you think the evidence once you hear it, will probably show the defendant

guilty?" According to defendant, this question was designed "to test a juror's potential feeling that an accused is probably guilty merely because he is on trial." Defendant argued, without citation to authority, that the disallowance of this question, "coupled with the Court's approval of death qualification questions . . . could well have resulted in a jury tainted in two ways against Poyner," that is, in favor of conviction and in favor of the death penalty.

The court refused to ask the question proposed by defendant. It gave two reasons for its decision. First, the court said because of the way the question was phrased a juror could answer "yes" and still be totally impartial. As a result, in the court's

view, the question would not help purge the jury of only those persons with a fixed opinion of the defendant's guilt or innocence. Second, the court was concerned that the question would require a juror to speculate on what evidence would be presented. The court suggested an alternative question: "Have you formed an opinion as to the guilt or innocence of the accused even though you have not heard the evidence of the case?"

In LeVasseur, the trial court would not permit defendant's counsel to ask a certain question on voir dire. Defendant complained that he had a right to ask the question the way he wanted it asked. We rejected that argument and wrote as follows:

> A party has no right, statutory or otherwise, to propound any question he wishes . . . . The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so.

225 Va. at 581, 304 S.E.2d at 653. Here, we find no abuse of the discretion vested in the court. Defendant's arguments regarding a possible taint resulting from not being allowed to ask the question he proposed are speculative and conclusory. The reasons given by the court for rejecting defendant's questions, as phrased, are well-founded. Further, here, as in LeVasseur, the question proposed by the court was sufficient to preserve defendant's right to a fair trial by an impartial jury.

3. Exclusion of Jurors Opposed to

the Death Penalty

In the Williamsburg Case, without identifying which jurors were improperly excluded, defendant makes the general statement that "[t]he record in this case indicates that several jurors were excused for cause because of similar answers." The "similar answers" language refers to cases cited by defendant wherein the juror's opposition to the death penalty was described as not being "unequivocal."

[12] The record reveals that, at trial, defendant objected to the court's excusing two jurors. However, as the Commonwealth points out, the basis for those objections was defendant's general opposition to death-qualification voir dire questions -- an argument considered and rejected above. Defendant did not

object on the ground that the answers given by two jurors did not meet the Witherspoon standard for excluding a juror for cause. (See Wainwright v. Witt, 105 S.Ct. 844 (1985), for the Supreme Court's most recent discussion of the test for excluding jurors for cause in capital murder cases.) As a result, the issue defendant now attempts to raise is not cognizable on this appeal. Rule 5:21.

III. Trial Matters and Statutory Review

A. The Williamsburg Case

In this case, Poyner was tried before a jury on two charges of capital murder in the commission of robbery while armed with a deadly weapon. Code § 18.2-31(d). In the guilt phase of his bifurcated trial, he was convicted of the capital murders of Clara Paulette

and Chestine Brooks. In the penalty phase, he received two separate death sentences for the murders.

1. The Guilt Phase

During the guilt phase of the trial, the Commonwealth introduced into evidence an edited version of his videotaped confession, the portion concerning the murders of Paulette and Brooks. In the videotape, Poyner stated that on the morning of January 30, 1984, he awoke early and walked around until he stole a car in Hampton. He then drove to Williamsburg and "on impulse" stopped at the Raleigh Motel. He entered the motel and encountered an "elderly Caucasian woman." He pointed a gun at her and told her he wanted her money. The woman, Clara Paulette, said that he had "caught her at a bad time."

Nevertheless, in Poyner's words, she gave him "what she had." The amount taken was approximately $40.00.

While the armed robbery of Paulette was in progress, Chestine Brooks walked into an adjacent room, saw what was going on, retreated to a small kitchen area, and sat down and bowed her head in full view of Poyner. Once Poyner had Paulette's money he made Paulette and Brooks stand with their backs to him facing a kitchen counter. Neither woman resisted. Neither screamed nor tried to attract attention. Both did exactly as they were instructed. Though nothing impeded defendant's getaway, he shot both women in the back of the head with a .38-caliber pistol. After they slumped over dying, he left. He stated that he chose women as his victims

because when women see guns they become frightened and therefore robbing women was less of a "hassle."

Other evidence presented by the Commonwealth established that a .38-caliber pistol was found in a search of Poyner's room. Further, the bullets removed from the bodies of Paulette and Brooks were determined to have been fired from that gun.

a. Admissibility of Photographs

Defendant contends it was error for the trial court to admit into evidence, in the guilt phase of the case, certain pictures of the victim Clara Louise Paulette. Defendant objected to Commonwealth's Exhibits 5 and 6, claiming that they were inflammatory, prejudicial, and unnecessary. Exhibit 5 was a photograph of Paulette taken on

the date of the autopsy. It showed her fully clothed, face up on a table. Exhibit 6 showed the wound in the back of Paulette's head.

The trial court ruled that the photographs were admissible because they did the following:

> 1. showed decedent's face so it could be established that the decedent was the person to whom the several witnesses referred;
>
> 2. showed that the wound was precisely located in the back of the victim's head and that the wound was the result of an aiming and shooting; and
>
> 3. showed the location of the wound in the back of the head thus corroborating defendant's testimony that he shot the victim in the back of the head.

Defendant objects to the photographs on the ground that their prejudicial effect outweighed their probative value.

[13] The admission of photographs is a matter resting within the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of discretion. See Stockton v. Commonwealth, 227 Va. 124, 144, 314 S.E.2d 371, 384, cert. denied, 105 S.Ct. 229 (1984), and the cases cited therein. We have reviewed the photographs and considered the court's reasons for admitting them. We find no abuse of discretion regarding their admission into evidence.

b. Motion to Strike

Defendant assigned error to the trial court's failure to grant his motion to strike at the conclusion of the Commonwealth's case. However, this issue was neither briefed nor argued. We will not consider it further.

2. The Penalty Phase

a. Introduction of Prior Unadjudicated Criminal Activity

During the penalty phase, the trial court permitted the Commonwealth to introduce into evidence the unedited version of Poyner's videotaped confession in which he confessed to murdering five women, including Paulette and Brooks. Defendant says this was error. Defendant contends this evidence was "irrelevant, unreliable and most [importantly] prejudicial." Defendant argues that he was, in effect, being tried in the Williamsburg Case for unrelated crimes.

In oral argument, defendant admitted that the statute does not limit proof, at the penalty phase, to the prior record of convictions. Nevertheless, he

contends the evidence of unadjudicated criminal activity is unreliable and should not be used. We disagree.

[14] In Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520, cert. denied, 464 U.S. 865 (1983), we said that pursuant to Code § 19.2-264.4 "more than the mere police record of the defendant may be introduced" during the penalty phase of the case. Id. at 298, 302 S.E.2d at 526. We specifically stated that "[t]he statute does not restrict the admissible evidence to the record of convictions." Id., 302 S.E.2d at 526.

Here, defendant's confession to five murders was highly reliable and wholly relevant to the issue of future dangerousness. There was no error in

admitting the full videotape into evidence.

b. Testimony Regarding the Possibility of Parole

During the penalty phase, defendant called the Chairman of the Virginia Parole Board to testify concerning defendant's parole eligibility. The court would not permit the testimony. Defendant says this was error. We disagree.

[15] The jury had no right to know what might happen to defendant, in terms of parole eligibility, after sentencing. During the penalty phase it was the jury's duty to assess the penalty, irrespective of consideration of parole. See Peterson, 225 Va. at 296-97, 302 S.E.2d at 525; Hinton v. Commonwealth,

219 Va. 492, 495, 247 S.E.2d 704, 706 (1978).

3. Statutory Issues

a. Facts Adduced at Penalty Stage

In order for the Court to make its independent assessment of the propriety of the two death sentences imposed in the Williamsburg Case, it is well to consider the facts adduced at the penalty stage.

The evidence established that on January 23, 1984, defendant stole a car and drove aimlessly around. "[O]n impulse" he decided to enter a beauty salon in a small shopping center in Hampton, in broad daylight, near noon. He walked in and a woman, Joyce Baldwin, came from the back of the store talking amicably to him about the hair care products she sold and what could be done

with defendant if he took care of his hair. Defendant responded by pulling a gun on Baldwin and telling her that he wanted her money. He said that the woman "jumped," that "[s]he looked like she wanted to cry," and that "[s]he was real scared." He admitted that the woman, though frightened, did as she had been told and put money from the cash register into a bag. He ordered the woman to walk to the back of the store. He said she cried and begged him not to kill her. He shot her in the back of the head from a distance of four to six feet. He said he got "about $40, $50, $60 probably."

On January 30, 1984, he killed Paulette and Brooks in Williamsburg. His pattern was similar to that used a week earlier in killing Baldwin: he

stole a car and drove around until, on "impulse," he selected a target. He committed his crime in broad daylight near noon. The victims were women who did just as he ordered. He shot both women in the back of the head after taking "$30, $40, $50."

On January 31, 1984, he killed again. The victim was a lone female clerk in a High's Ice Cream store in Newport News. That morning he stole a car and drove around. He spotted Vicki Ripple alone in the store near noon. On "impulse" he decided to rob the store. He did not know the victim and did not recall ever having been to that store before. He walked in, pointed a gun at the teenaged attendant and demanded money. He said, "She jumped." He said further that "[s]he was scared at first,

but she reached over and got the bag and filled it up." The victim, after complying with all defendant's demands, then walked into a corner and covered her head with her arms, in essence cowering in a corner in fear for her life. Poyner shot her in the head. He got "20, $30, $35 probably."

On February 2, 1984, Poyner was in Hampton. Sometime before noon, he saw Carolyn Hedrick walk out of a store and approach her car. He walked up to her with a gun in his hand and said "I want your money and get in the car." He said "[S]he screamed. She was nervous. And she got in. So I drove a block from there." Once in the car he made his victim disrobe to prevent her from escaping. She cried and begged for her life. He said he stopped near a

telephone pole in Hampton and shot her in the left side of the head. He then drove into Newport News and dumped her nude body behind a church in a parking lot. He said he shot her so she could not identify him. He observed that the victim had boxes of candy in her car. He drove around, in the victim's car, selling her candy to some and giving it to others. He got "20, $30, $40 probably."

Poyner called several witnesses in mitigation. Poyner's father testified that defendant's mother had died three years before the murders. He testified further that he left Poyner when Poyner was three years old and, except for two brief visits, did not see Poyner again until after the murders.

Poyner's half brother testified that defendant had been "a little energetic" as a child, that defendant had gotten into trouble as a youth, that defendant's mother had trouble with defendant's taking things, but that he had never observed defendant commit acts of violence.

A psychiatrist who had examined defendant in 1974, ten years before the murders, said he was not aware of any history of violent behavior.

Another witness, a juvenile corrections officer, said that while defendant was incarcerated in 1970 and 1972, there was no history of violent behavior, and that defendant adjusted satisfactorily.

A professional bondsman, who had posted bond for Poyner in the past,

testified that Poyner's mother had asked him, the bondsman, to have talks with Poyner to urge him to stay "straight." The witness said he talked to defendant once each month until Poyner's mother died, at which point Poyner stopped coming to visit. The witness said that from 1972 to 1978 he did not notice any violent behavior on the part of Poyner.

A parole officer who had worked with Poyner for two months as a result of two breaking and entering charges was asked whether defendant had a history of violent behavior. The witness referred to his records and said, "The only charges that our records show are in '76, March of '76, he received a charge of assault on an officer [for] which he received six months in the city prison farm." The witness said his records

also revealed instances of petty larceny, tampering with autos, and resisting arrest.

Poyner also called as a witness, Dr. James C. Dimitris, a forensic psychiatrist at Central State Hospital in Petersburg, Virginia. Dr. Dimitris examined defendant on several occasions subsequent to defendant's arrest for the 1984 murders. He said defendant suffered from a "mixture of passive and aggressive personality, with some characteristics of antisocial behavior." The witness said defendant did not commit any acts of violence while at Central State.

On direct examination, Dr. Dimitris was asked for an opinion whether defendant would be dangerous in the future. He responded: "I don't know.

He has the ability to control the impulses if he so wishes." He testified further, again on direct examination, that the test showed defendant did not meet the "criteria of insanity." He said too that the Commonwealth has facilities to treat people "who are motivated to change themselves."

On cross-examination Dr. Dimitris testified that defendant had no diagnosis of psychosis. He went on to say that based on his examination, defendant knew right from wrong at the time of the murders. According to Dr. Dimitris, defendant knew the nature and consequences of his acts; he was not feebleminded; he had no organic dysfunction; he had no mental defects; he had no mental disease; and his

thinking was not so distorted that he did not know right from wrong.

On redirect, the witness added, however, that defendant's thinking was distorted to the extent that defendant "didn't have love for the people any more, the people that were killed."

A clinical social worker who interviewed defendant when he was brought to Central State testified that based on her interview she identified three problem areas in defendant's life: 1. family relation difficulties, 2. difficulties associated with the death of his mother, and 3. marital difficulties.

Defendant's wife testified that while they were together they had a normal relationship. She said if they argued it "wasn't nothing violent,

nothing like that." She said when he went off to serve jail time she saw other men and told him she "had other friends." She said, "[H]e didn't have no reaction no more than said . . . he didn't want nothing to happen to me."

A classification supervisor with the Newport News Sheriff's department said she had known defendant since 1977, and that she had been his educational instructor at the jail. She said Poyner was "very quiet" and that he had a hard time in his studies. She said that when she was working with him, defendant tested at the fourth grade level. She said he had not caused any trouble in jail while she was there.

The jury returned two separate death sentences, both based on future dangerousness. The court order a

presentence report, as required by law. After consideration of the report the court entered judgment on the sentences of death.

b. Passion, Prejudice, Arbitrariness

[16] Defendant refers to the "possibility" that the jury's determination was clouded by "passion and prejudice." However, he points to nothing in the record that would support the suggested possibility of passion and prejudice. Upon our independent review of the record, we find no evidence that the death sentence in this case was imposed on the basis of passion, prejudice, or arbitrariness.

c. Excessiveness and Disproportionality

[17] Nor are the death penalties in the Williamsburg Case excessive or disproportionate. Poyner's actions

graphically illustrated the probability that he would "commit criminal acts of violence that would constitute a continuing serious threat to society," Code § 19.2-264.2. While he was on his crime spree, no lone female was safe. He struck boldly in the broad daylight because he knew he would kill his victim and there would be no witness to identify him. He selected his victims on impulse. He ignored pleas for mercy. He ignored cries of fear and anguish. Even as he described his criminal acts on videotape he showed no remorse. In each case he could have accomplished his armed robbery without killing but he killed anyway. He killed execution style, at point-blank range, with shots to the head. He preyed on women because he thought they would not resist and

even though they did not resist he took their lives.

Though defendant contends the death penalties in the Williamsburg Case are excessive and disproportionate, he cites no cases in support of that position. Even so, we have accumulated and considered the records of all the capital murder cases reviewed by this Court whether a sentence of death was imposed or not. We have placed particular emphasis upon cases involving capital murder in the commission of robbery while armed with a deadly weapon where the basis for the death penalty was future dangerousness. It is our conclusion that juries in Virginia customarily impose the death sentence for conduct similar to defendant's. See, e.g., Peterson v. Commonwealth, 225

Va. 289, 302 S.E.2d 520, cert. denied, 464 U.S. 865 (1983) (capital murder/robber; victim shot once in abdomen; death penalty based on future dangerousness); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983) (capital murder/robbery; victim killed by multiple hammer blows to her head, neck and back; death penalty based on vileness and future dangerousness); Clanton v. Commonwealth, 223 V. 41, 286 S.E.2d 172 (1982) (capital murder/robbery; victim strangled with belt; death penalty based on vileness and future dangerousness); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, 456 U.S. 938 (1982) (capital murder/robbery; victim shot six times in back, arm, and lip;

four shots were fired within inches of the victim; death penalty based on future dangerousness); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981) (capital murder/robbery; victim died from gunshot wounds to chest; death penalty based on vileness and future dangerousness).

Based on all the facts and circumstances of the Williamsburg Case, we find no error either in the convictions or in the sentences.

B. The Hampton Case

In this case, Poyner was tried by the court sitting without a jury for the capital murders of Joyce Baldwin and Carolyn Hedrick in the commission of robbery while armed with a deadly weapon. He was also charged, among

other things, with raping Hedrick. The evidence in the guilt phase of the trial was stipulated by counsel. The trial court found defendant guilty as charged.

At the end of the penalty phase of the trial, he was sentenced to death on the grounds that the murders of Baldwin and Hedrick were vile and because he was determined to pose a future danger to society. He contends, on appeal, that the Commonwealth failed to prove, beyond a reasonable doubt, that the murders were vile or that he would be dangerous in the future. We disagree.

1. The Statute

Before the death penalty can be imposed, the Commonwealth must prove beyond a reasonable doubt either

> that there is a probability that the defendant would commit criminal acts

> of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. . . .

Code § 19.2-264.2. The first part of the statute is sometimes referred to as the future dangerousness predicate while the second part is sometimes referred to as the vileness predicate.

2. Vileness: Proof of Depravity of Mind

The trial court found that the two murders were vile in that they involved both aggravated battery and depravity of mind. Of course, under the statute,

proof of both is not required to establish vileness.

On appeal, the Attorney General conceded that neither murder involved an aggravated battery. He argued, however, that the finding of vileness must still be upheld on the basis of the "depravity of mind" alternative of the vileness predicate. According to the Attorney General, psychological torture reflects depravity of mind. And, he submits, the victims of these two murders were subjected to psychological torture before they were killed.

We have not heretofore decided whether depravity of mind can be established upon proof of psychological torture. However, in Stamper v. Commonwealth, 220 Va. 260, 282-83, 257 S.E.2d 808, 823-24 (1979), cert. denied,

445 U.S. 972 (1980), we discussed mental torture: We said "[T]here was no direct evidence of torture or aggravated battery in the commission of those crimes, although mental torture might reasonably be inferred from what could be characterized as execution-type murders." In essence, in Stamper, we acknowledged the existence of psychological torture.

[18] In support of its psychological torture argument, the Attorney General cites Burger v. Zant, 718 F.2d 979, 987 (11th Cir. 1983), vacated on other grounds, 104 S.Ct. 2652 (1984), where the court held as follows:

> [A] death sentence may constitutionally be imposed. . . based on a finding that the defendant inflicted either

psychological or physical torture upon his victim. We can discern no principled basis for attempting to distinguish the two. . .

In Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967 (1979), we defined depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." We think that psychological torture falls squarely within the foregoing definition. Therefore, we hold that depravity of mind, an aspect of the vileness predicate, can be established by proof of psychological torture.

Defendant argues that neither of these murders involves vileness because

the victims died instantly. He cites Godfrey v. Georgia, 446 U.S. 420 (1980). However, as the succeeding sections will establish, the facts here and those in Godfrey are not the same. See Turner v. Bass, 753 F.2d 342 (4th Cir. 1985), for a discussion of instantaneous death and the vileness predicate.

a. Vileness: The Baldwin Murder

On the day Poyner killed Baldwin, he was driving aimlessly around when he came upon the small shopping center in which Baldwin's hair salon was located. On "impulse" he pulled up to the salon and walked in. Baldwin came from the back of the shop talking amicably to Poyner. She talked about her hair care products and what they could do for Poyner if he took care of his hair.

At some point as she talked she turned away from Poyner; when she turned to face him again a .38 caliber pistol was pointed at her. Poyner told her he wanted her money. According to him, "she jumped. She looked like she wanted to cry. She was real scared. So she put the money in the bag . . ."

After she had done what he wanted, he made her turn her back to him and walk away. All the while, she cried and begged him not to kill her.

The record does not reveal how long Poyner was in the store with the gun pointed at Baldwin. Poyner is the only living witness. The record does show, however, that Baldwin had time to realize Poyner's deadly purpose and to peer down the barrel of a .38-caliber pistol in the hands of a person who had

let her get a good look at his face. She had time to realize that since she could identify him she was a potential threat to him.

After Baldwin had turned over the money, he made her turn away and expose her back to his gun. He did not shoot her immediately; he let her, indeed ordered her to walk away from him, toying with her, implying that she might be spared. The he shot her in the head.

[19] Poyner's conduct in shooting a defenseless woman in the back of the head, a woman begging for her life after she had complied with all his demands, showed a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. He engaged in psychological torture of

Baldwin. He made her know that her fate dangled from the end of his trigger finger. He killed her execution style for no reason other than to eliminate a witness. As we have said, even in recounting the killing in his videotaped confession he showed no remorse.

The killing in Godfrey v. Georgia, 446 U.S. 420 (1980), was nothing like the killing of Baldwin. In Godfrey, an estranged husband looked through a window into a trailer, saw his wife, and immediately shot her through the window. He then rushed inside, struck his daughter with the rifle, and shot his wife's mother. There, in that domestic conflict, the victims were not forced to function with a gun pointed at them, they did not have time to beg for their lives, they did not have time to cry.

They were killed almost as soon as they were aware that they were in danger; not so with regard to Baldwin's death. The killing of Baldwin was vile.

b. Vileness: The Hedrick Murder

Poyner killed Hedrick on February 2, 1984. He approached her as she walked to her car. He pointed a gun at her and forced her to get inside the car. She screamed when he first approached her, but that did not dissuade Poyner, even though he was on a public street in broad daylight. He made Hedrick disrobe. He raped her. He shot her in the head. He pushed her nude body out of a car onto a parking lot behind a church. He then drove around in his victim's car selling and giving away candy he found in the back seat.

This conduct was vile. Only a depraved mind could conjure up such abuse. He terrified this woman. She did everything he demanded including disrobing in a car in the middle of the day. Throughout this ordeal, by his own admission, his victim cried and begged that her life be spared. He shot her anyway. Hedrick was executed. By Poyner's own admission, the only reason he shot her was to eliminate her as a witness. He engaged in psychological torture.

3. Future Dangerousness

[20] Even if vileness had not been proved as to each murder, the death sentences would nonetheless be appropriate because the evidence proved Poyner's future dangerousness beyond a reasonable doubt. See Zant v. Stephens,

462 U.S. 862 (1983). A review of the evidence adduced during the penalty phase of the trial shows with clarity Poyner's future dangerousness.

Poyner's record of convictions prior to July 24, 1984, was entered into evidence. It contained nineteen convictions, starting in September 1974 and running through July 12, 1984. Early in his criminal career, in 1976, he was convicted of "Assault on Police Officer." His record showed three capital murder convictions, convictions for breaking and entering, for robbery, and for use of a firearm.

The Commonwealth called as a witness a man who had socialized with Poyner on several occasions near the time of the five murders. While with Poyner in the middle of January 1984, the witness

noticed a brown-handled pistol inside Poyner's vest. On another occasion, the witness heard Poyner say that if he ever contracted a disease from a woman he would "kill them." The witness was with Poyner on February 3, 1984, as Poyner read a newspaper account of the Hedrick murder. The witness said Poyner described the article to people present and that he showed no emotion while doing so.

Another witness, a woman, testified that Poyner approached her in a shopping mall on January 16, 1984, near 10:30 in the morning, and grabbed her purse. When she resisted, Poyner pulled her to the ground, dragged her a few feet, broke her arm in two places, and escaped with her purse.

Detective Browning of the Hampton Police testified that he went to Poyner's house on February 1, 1984, in response to a telephone call from Poyner in which Poyner claimed to have information regarding the murder of Joyce Baldwin. Poyner admitted Browning into the house which Poyner shared with a Reverend Wilson. Poyner then told the officer that he had overheard a woman in a cafe tell her companion that she knew who killed Baldwin. Poyner could not identify either of the people who allegedly participated in this conversation. It is plain that Poyner was attempting to mislead the police in order to divert attention from himself.

The Commonwealth entered into evidence Poyner's entire videotaped confession. In the videotape, Poyner

confessed to shooting five women in the head. Each victim did as he directed. At least two cried and begged not to be shot. All the victims were selected on "impulse." He victimized women because he thought he could frighten them with a gun. He thought it would be easier to rob a female. Detective Browning said that after Poyner finished making his videotaped confession Poyner told Browning that Poyner killed the women so they could not identify him.

Poyner put on evidence in mitigation. He called an official from the Department of Corrections who had processed him on two occasions when he served time in the system. The witness, an assistant superintendent for evaluation and classification, said that in 1970 and 1972, defendant was unsure

of himself and "was showing some signs of being paranoid and/or schizophrenic." He said that defendant was referred to Eastern State Hospital but was not admitted as a patient.

Poyner also called Dr. James Dimitris, a forensic psychiatrist at Central State Hospital. Dr. Dimitris testified that defendant fit "the concept of mixed personality disorder with passive/aggressive and antisocial personality traits." Dr. Dimitris explained that a person with an antisocial personality is prone to stealing, vandalism, and destruction of property or life and does so "without making adjustments out of it in life later on or learn[ing] from the previous experience [to] do better, but continues

the same kind of self-centered, immature type of behavior."

Dr. Dimitris stated that Poyner's condition is treatable if there exists an "honest relationship" between the patient and a professional. The witness said that while Poyner was at Central State for twelve days he was one of the best patients in the unit. He said too that when Poyner killed, Poyner was taking out frustration against his wife or somebody else.

On cross-examination, Dr. Dimitris admitted that anybody willing to be treated is treatable. He also admitted that there is no guarantee of success even if a person is treated. With regard to Poyner's mental state, Dr. Dimitris testified that defendant's intelligence was in the dull-normal

range; that at the time of the killings, defendant knew right from wrong and the consequences of his actions; that defendant suffered from no psychosis; that defendant had no deficiency of intellect and no brain damage. Dr. Dimitris also said that defendant robbed people to get money and killed them so they would not turn him in to the authorities.

We reject defendant's contention that the evidence did not establish future dangerousness. One significant error in defendant's argument is his claim that he had committed no acts of violence prior to January 1984. Yet, he assaulted a police officer in 1976. That is an act of violence indicating disdain for the law itself. Further, defendant apparently would have us

forget that seven days before he killed Baldwin, he broke a woman's arm stealing her purse. And, that by the time of the Hedrick murder, he had already killed four times. Defendant claims there is no way to predict future criminal behavior. We disagree. After a long career of crime, defendant graduated to repeated acts of violence and relentless killing; we think the evidence is wholly sufficient to establish future dangerousness.

4. Statutory Review

a. Passion, Prejudice, and Arbitrariness

Our independent review of the record reveals nothing to suggest that the death penalties imposed in the Hampton Case were the result of passion, prejudice, or arbitrariness. The

stipulated evidence concerning guilt was fully sufficient. The evidence during the penalty phase was, as previously demonstrated, ample. We hold that the death penalties were not imposed arbitrarily or on the basis of passion or prejudice.

b. Excessiveness and Disproportionality

[21] Defendant contends that the death penalties are excessive and disproportionate in the Hampton Case because it would be better to imprison defendant for life. But whether defendant could be sentenced to life imprisonment is not the question; the question is whether the death penalty is customarily imposed in crimes of this kind. Coppola v. Commonwealth, 220 V. 243, 258-259, 257 S.E.2d 797, 807-08

(1979), cert. denied, 444 U.S. 1103 (1980).

[22] In arguing that the death penalty is excessive and disproportionate, defendant also contends that what he did to his victims is not as heinous as what was done to the victims in Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980), and Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979). But his reliance upon those cases is misplaced. Those were cases of aggravated battery. These are depraved-mind killings where the defendant has also been determined to pose a future danger to society. Just because the murder scenes created by Poyner may be less gruesome than those in Briley and Smith, it does not follow

that this defendant is less culpable for his murders.

Defendant fails to cite any case which supports his argument of excessiveness and disproportionality. And, upon our review of the accumulated records of all death penalty cases considered by this Court, we find none. To the contrary, the cases show that the death penalty is customarily imposed in this type case. See, e.g., Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984) (capital murder/robbery; one victim shot in face then set afire, death from smoke inhalation; other victim shot in face from a distance of less than a foot; death penalty based on vileness); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063, (1984)

(capital murder/robbery; victim beaten and stabbed repeatedly; body found bound with evidence of attempt to burn body; death penalty based on vileness); Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271, cert. denied, 464 U.S. 977 (1983) (capital murder/robbery; victim shot and strangled; death from both causes; death penalty based on vileness); Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520, cert. denied, 464 U.S. 865 (1983) (capital murder/robbery; victim shot once in abdomen; death penalty based on future dangerousness); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983) (capital murder/robbery; victim killed by multiple hammer blows to her head, neck, and back; death penalty based on vileness and future

dangerousness); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982) (capital murder/robbery; victim strangled with belt; death penalty based on vileness and future dangerousness); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, 456 U.S. 938 (1982) (capital murder/robbery; victim shot six times in back, arm, and lip; four shots were fired within inches of the victim; death penalty based on future dangerousness); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981) (capital murder/robbery; victim died from gunshot wounds to chest; death penalty based on vileness and future dangerousness).

Based on all the facts and circumstances of the Hampton Case, we

find no error either in the convictions or in the sentences.

C. The Newport News Case[1]

In this case, Poyner was tried before a jury on a charge of the capital murder of Vicki Ripple in the commission of robbery while armed with a deadly weapon. He was convicted of capital murder and sentenced to death on the ground that he posed a future danger to society.

1. The Guilt Phase

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[1]Among other things, defendant questions the jury verdict in the Newport News Case on the ground that it was contrary to the law and evidence. This assignment is defective. "An assignment of error which merely states that the judgment is contrary to the law and the evidence is not sufficient." Rule 5:21. We will not consider it further.

During the guilt phase of the trial, the portion of Poyner's videotaped confession concerning the Ripple murder was entered into evidence. Poyner confessed that sometime near noon on January 31, 1984, he was driving past a High's Ice Cream store in Newport News when he observed a lone female in the store. On "impulse" he decided to rob the store. He walked in, pointed his .38-caliber pistol at the seventeen-year-old clerk and demanded money. He said "[s]he jumped" and "was scared at first" but that she did his bidding and put money from the cash register into a paper bag. After she had done as Poyner directed, Ripple walked into a corner and covered her head with her arms. She did not attempt to run. She simply crouched in a corner

in terror. Poyner shot her in the head. He chose Ripple as a victim because he thought women were less difficult to rob than men because they were afraid of guns. Poyner got "twenty, thirty, thirty-five dollars."

In other evidence, the Commonwealth established that the bullet which killed Ripple was fired from a gun found in a search of Poyner's room. The victim's body was not mutilated, nor had she been raped.

a. Question from Jury

Re: Life Imprisonment

[23] At the end of the guilt phase of the trial, after the jury had retired, it returned to the courtroom and its foreman asked the court to define "life imprisonment." The court advised the jury that it should read the

instructions already given to it. The court reminded the jury of its duty, upon a finding of guilty, to punish defendant in accordance with the law stated in the instructions. In short, the trial court adhered to our holding in Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978), that the jury has no right to be advised of post-sentencing events. Poyner claims the court's response was in error. We think it was precisely what the law required. There is no merit to this argument.

b. Motion to Strike

Defendant questions the trial court's failure to strike the Commonwealth's evidence at the close of the case. We have recounted the

evidence in this case. It is clear that this argument is without merit.

c. Sufficiency of Evidence of Capital Murder

[24] Defendant contends the evidence was insufficient to establish that the murder was committed during the commission of robbery while armed with a deadly weapon. The only argument advanced in support of this proposition is this sentence contained in the brief: "The evidence in this case shows that the act of robbery was complete before the intent to commit murder was formed." The fact that defendant had the money in hand before he shot Ripple does not mean that he can escape a charge and conviction of capital murder; robbery is a continuing offense. See Linwood Earl Briley v. Commonwealth, 221 Va. 532, 273

S.E.2d 48 (1980), cert. denied, 451 U.S. 1031 (1981). The issue was whether the murder occurred "in the commission of robbery." Code § 18.2-31(d). There is ample evidence to support that conclusion. Without rehashing all the facts, we consider it pertinent that the victim had gotten a clear look at Poyner and thus could have identified him. Further, at the time she was killed she was huddled in a corner, covering her head with her arms. The jury could reasonably have concluded that Poyner killed Ripple to prevent her from calling for help and to keep her from identifying him as the robber.

2. The Penalty Phase

a. Testimony Regarding Parole

Poyner complains that during the penalty phase the trial court erred in

failing to grant Instruction I which provided: "In Virginia, any person convicted of three separate offenses of murder or armed robbery, when such offenses were not part of a common act, shall not be eligible for parole." He says further that the court erred in not allowing the Chairman of the Virginia Parole Board to testify concerning Poyner's parole eligibility. A virtually identical argument was made in the Williamsburg Case. What we said there applies with equal force here. The trial court correctly refused Instruction I and the testimony of the parole board official.

b. Instructions Regarding Vileness and Mitigation

Defendant complains that the court erred in refusing to grant Instructions

D, E, and G, and in failing to grant Instruction C in its original form. These instructions concern requirements for the imposition of the death penalty. The death penalty in this case was based on defendant's future dangerousness. The Commonwealth did not rely upon the vileness predicate of the statute.

[25] Instruction C in its original form made reference to vileness as a basis for the imposition of the death penalty. It its amended form, those references were deleted. Instruction D also related to vileness; it defined "depravity in mind." Instruction E likewise related to vileness; it defined "aggravated battery." Since the death penalty in this case was not based on vileness, Instruction C in its unamended form and Instructions D and E related to

matters not in issue. Therefore, the court properly amended Instruction C and properly refused Instructions D and E.

[26] Defendant's proposed Instruction G provided as follows:

> The law recognizes certain factors which the jury should take into account as factors which favor a life sentence. They are not excuses. The law will not excuse the accused's conduct, but will severely punish him by death or a life sentence. But there are reasons which the law recognizes as valid reasons for imposing a life, rather than death sentence.
>
> The law, in its wisdom, provides the jury with a mechanism through which it can ferret out the cases in which death is deserved

from those in which it is not. This mechanism is called mitigation.

At trial the Commonwealth's Attorney objected to this instruction on the ground it was argumentative. Counsel for defendant advanced no argument in support of the instruction. The court refused the instruction on the ground it was argumentative. On appeal, neither on brief nor in oral argument did counsel advance a reason or cite authority in support of this instruction. We agree that it was argumentative, and we conclude that the trial court properly refused to grant it.

c. Permissible Evidence During Penalty Phase

Defendant complains of the use, during the penalty phase of the Newport

News Case, of photographs, videotaped confessions, and oral testimony of other capital murder charges against him. For the reasons stated in our discussion of the Williamsburg Case, we hold that this evidence was properly admitted in this case.

3. Statutory Issues

Turning now to a consideration of the factors that we must, by statute, consider, we find no evidence that the death penalty imposed in the Newport News Case was the product of passion or prejudice, or that it was arbitrarily imposed. Significantly, defendant does not suggest that passion, prejudice, or arbitrariness played any role in the imposition of this death sentence.

[27] Nor does our review of the record lead us to the conclusion that

the imposition of the death penalty in a case such as this is either excessive or disproportionate to the penalties imposed in similar cases. The only thing defendant says on this point is that instead of considering only Virginia cases, we should consider cases from across the nation in determining excessiveness. Suffice it to say that defendant's suggestion is not the law. See Coppola v. Commonwealth, 220 Va. 243, 256, 257 S.E.2d 797, 806 (1979), cert. denied, 444 U.S. 1103 (1980).

In Virginia, in cases of this kind, juries customarily impose the death sentence. See, e.g., Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520, cert. denied, 464 U.S. 865 (1983) (capital murder/robbery; victim shot once in the abdomen; death penalty based

on future dangerousness); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983) (capital murder/robbery; victim killed by multiple hammer blows to her head, neck, and back; death penalty based on vileness and future dangerousness); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982) (capital murder/robbery; victim strangled with belt; death penalty based on vileness and future dangerousness); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, 456 U.S. 938 (1982) (capital murder/robbery; victim shot six times in back, arm, and lip; four shots were fired within inches of the victim; death penalty based on future dangerousness); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36

(1980), cert. denied, 451 U.S. 1011 (1981) (capital murder/robbery; victim died from gunshot wounds to chest; death penalty based on vileness and future dangerousness).

Based on all the facts and circumstances of the Newport News Case, we find no error either in the conviction or in the sentence.

IV. Conclusion

The five death sentences entered in the three cases will all be affirmed.

Record No. 841434 - Affirmed.

Record No. 841435 - Affirmed.

Record No. 841539 - Affirmed.

Record No. 841540 - Affirmed.

Record No. 841589 - Affirmed.

Circuit Court for the
City of Newport News
Commonwealth v. Syvasky Poyner
June 21, 1984

Transcript of Proceedings
on Preliminary Motions

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p. 76 Vincent Conway,

called as witness by the

Defendant, being duly sworn,

testified as follows:

p. 77 Direct Examination

BY MS. COLES:

Q Will you state your name and occupation, please, sir.

A Yes, my name is Vincent Conway, and I'm an attorney, licensed to practice law in the

Commonwealth of Virginia with business offices on Warwick Boulevard.

Q And in your capacity as an attorney, did you come into contact with Syvasky Poyner in February of 1984?

A Yes, I did.

Q Okay, what date was that in February, please?

A I do not know the exact date. It was the Monday after he was arrested in the early morning hours of a Saturday. Two days after that Saturday.

* * *

pp. 81-82

Q All right. And did you also ask him about his -- his -- any statement he made regarding an attorney?

A I did inquire of him whether or not he had requested an attorney prior to making any statement to the police.

* * *

Q All right, Mr. Conway.

A Mr. Poyner did indicate to me that prior to making any statement, he had asked if he could have an attorney and in his words, he told me that he was informed that he would have to wait until Monday.

* * *

p. 83 Cross Examination

Q All right. Now, was he saying that someone told him he couldn't have an attorney until Monday or was this his -- his knowledge of the system, was he repeating to you?

A Mr. Robinson, you know, to be honest, I don't know. He did state to me that he was advised when he asked for an attorney that he would have to wait until Monday. Those were his words to me. His perception of what was said. And that's all I can say.

Q He didn't say when this took place, did he or did he?

A He indicated it was early Saturday morning. After he was at the police station.

Syvasky Lafayette Poyner

v.

Toni V. Bair, Warden of the Mecklenburg Correctional Center

Record No. 870883
Supreme Court of Virginia
(Final Order dated 29 April 1988)

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

Syvasky Lafayette Poyner

v.

Toni V. Bair, Warden of the Mecklenburg Correctional Center

Record No. 870990
Supreme Court of Virginia
(Final Order Dated 29 April 1988)

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

Syvasky Lafayette Poyner

v.

Toni V. Bair, Warden of the Mecklenburg Correctional Center

Record No. 870959
Supreme Court of Virginia
(Final Order dated 29 April 1988)

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

SYVASKY LAFAYETTE POYNER

v.

TONI V. BAIR, Warden
Mecklenburg Correctional Center

NO. 4868-B
CIRCUIT COURT
FOR THE CITY OF
WILLIAMSBURG AND JAMES CITY COUNTY
(Final Order dated 7 May 1987)

This case came to be heard upon the petition for a writ of habeas corpus of Syvasky Lafayette Poyner, as supplemented with his bill of particulars. The respondent thereafter moved the Court to dismiss the petition, to which motion the petitioner responded in his memorandum in opposition and to which memorandum the respondent filed his reply. The petition, as clarified

by the bill of particulars, presented the following allegations of substantive trial error:

I. The trial court erred in denying petitioner's motion to suppress inculpatory statements taken during police interrogation. (Pet. 11, 43-68):

(1) The statements were obtained during illegal police interrogations after he invoked his constitutional right to have an attorney present and to remain silent. (Pet. 41);

(2) The statements were induced by direct and implied coercion on the part of the police. (Pet. 41);

(3) The statements were involuntarily made to the police, and the Commonwealth failed to meet its heavy burden of proving that the petitioner intelligently, voluntarily and knowingly waived his rights. (Pet. 41);

(4) Subsequent inculpatory statements including the videotaped confession were causally connected to the initial coercive confession and should have been suppressed. (Pet. 42);

(5) Petitioner should have been re-advised of the Miranda rights prior to questioning about all non-Hedrick murders. (Pet. 66);

II. The trial court failed to suppress the evidence obtained by the police as a result of an invalid search warrant. (Pet. 12):

(1) The warrant did not particularize the area to be searched. (Pet. 14, 15, 16, 19-22);

(2) The warrant was based upon information obtained from petitioner in violation of his right to remain silent and right to counsel. (Pet. 13);

(3) To the extent that a search was conducted prior to the warrant being obtained and that search

prompted or otherwise influenced the obtaining of the warrant, petitioner's Fourth Amendment rights were violated. (Pet. I7, 18).

III. Petitioner was denied his right to a fair and impartial jury:

(1) There was systematic exclusion of those persons with moral scruples against the death penalty. (Pet. 28);

(2) The exclusion of jurors from the guilt stage of the trial solely because they were opposed to the death penalty resulted in a conviction-prone jury which did not constitute a cross-section of the community. (Pet. 29-32).

IV. Petitioner was denied his right to due process as a result of the conduct of the Court and the prosecutor during voir dire in presenting misleading, incorrect and confusing instructions. (Pet. 34-40):

(1) Petitioner's counsel and the prosecutor, by their voir dire, contributed to the confusion of the

jurors as to the burden of proof during the sentencing trial. (Pet. 35);

(2) The prosecutor's voir dire purposefully suggested that the State's burden of proof was less in the penalty phase of the trial than proof beyond a reasonable doubt. (Pet. 36);

(3) Petitioner could not make a reasoned selection of a fair and impartial jury under these confused circumstances because the prospective jurors could not intelligently respond to questions. (Pet. 37);

(4) Petitioner was denied his right to a fair and impartial jury because of the irreversible confusion that occurred prior to proper instructions being delivered by the court. (Pet. 38);

(5) The trial court failed until final instructions to apprise the jury that they could also consider the charge of first degree murder. (Pet. 39);

(6) The trial court failed to voir dire the veniremen to determine the existence of a preexisting conclusion or bias. (Pet. 40).

V. The trial court committed errors that substantially prejudiced petitioner's rights to due process during the guilt and sentencing phases of the trial and a fair trial:

(1) The trial court erred in permitting the prosecutor to elicit statements in contravention of petitioner's right to remain silent. (Pet. 69-72);

(2) The trial court erred in failing to strike the prosecution's evidence at the close of the State's case because once the confessions and fruits of those confessions were properly excluded, the State failed to meet its burden of proof as to petitioner's guilt. (Pet. 74);

(3) The trial court erred in admitting evidence of inflammatory, immaterial and irrelevant testimony and photographs of the crime scenes of the other

capital murders. (Pet. 116);

(4) The trial court violated petitioner's constitutional right to due process under the Eighth and Fourteenth Amendments by denying petitioner the opportunity to proffer evidence related to parole eligibility. (Pet. 118);

(5) The trial court violated petitioner's constitutional right to due process under the Eighth and Fourteenth Amendments by failing to instruct the jury regarding the law as it then related to the definition of a "life sentence" in Virginia. (Pet. 118);

(6) The trial court improperly denied petitioner's timely proffer of evidence that would more clearly define "life imprisonment". (Pet. 125);

(7) The trial court erred in denying a continuance. (Pet. 23-27);

(8) The trial court erred in restricting petitioner's voir dire. (Pet. 33).

VI. The "errors" of petitioner's trial counsel, the prosecutor and the court substantially prejudiced petitioner's right to due process of law. (Pet. 73).

VII. Petitioner's right to a fair trial and due process during sentencing were violated by introduction into evidence of overly dramatic or inflammatory evidence by the prosecution. (Pet. 119):

(1) The prosecutor presented evidence that lacked reliability and relied on aggravating circumstances not enumerated in the statute. (Pet. 119(a));

(2) The prosecutor presented evidence of unadjudicated charges that violated petitioner's constitutional right to be presumed innocent until proven guilty beyond a reasonable doubt. (Pet. 119(b));

(3) The prosecutor presented evidence of unadjudicated charges that violated petitioner's

constitutional right not to be held to answer for a capital crime except upon indictment of the grand jury. (Pet. 119(c));

(4) The prosecutor presented evidence establishing petitioner's guilt of murders occurring outside the jurisdiction that inflamed the jury, which punished petitioner for all five murders rather than for the specific murders committed within its jurisdiction. (Pet. 119(d)).

VIII. The trial court's instructions to the jury during sentencing were inadequate to preclude prejudice resulting from evidence of murders committed in other jurisdictions. (Pet. 120); specifically, the trial court failed to instruct the jury that:

(a) The petitioner was entitled to the presumption of innocence as to each of the unadjudicated charges. (Pet. 120(1));

(b) The petitioner was entitled to that presumption until his

guilt had been proven beyond a reasonable doubt. (Pet. 120(2));

(c) The petitioner had a right to remain silent under the Constitutions of the United States and Virginia and that no inference could be drawn from his silence in not responding to the allegations contained in the prosecution's proof of charges pending trial in another jurisdiction. (Pet. 120(3)).

IX. The Virginia death penalty statute is unconstitutional. (Pet. 121):

(1) The death penalty is cruel and unusual punishment in all circumstances. (Pet. 121);

(2) The death penalty is disproportionate and excessive. (Pet. 121);

(3) The provision of the Virginia Code permitting the death penalty based upon a finding of "future dangerousness" is

unconstitutionally vague. (Pet. 122);

(4) The death penalty as administered in the Commonwealth of Virginia results in a pattern and practice of arbitrary and capricious capital sentencing that does not serve the supposed penological justification of retribution and deterrence. (Pet. 123);

(5) The petitioner's death sentence was imposed under a sentencing statute that left the jury with unguided discretion to impose the death penalty as it pleased. (Pet. 124);

(6) Petitioner's rights were denied by the Commonwealth's failure to provide a reasonable alternative to the sentence of death. (Pet. 125):

(a) The statutory provisions for parole in capital murder cases do not allow a reasonable alternative to the death sentence. (Pet. 125);

(b) The State provides no explicit definition of "life imprisonment" in a capital case. (Pet. 125-127):

(i) This equates with standardless discretion in violation of Godfrey. (Pet. 128);

(ii) This encourages the jury to opt for certainty of death as opposed to the uncertainty of life imprisonment. (Pet. 129).

(7) The Virginia death penalty is unconstitutional because it deprives petitioner of the fundamental right to life and does not serve a compelling state interest. (Pet. 130-131);

(8) The Virginia death penalty statute violates the petitioner's right to privacy. (Pet. 132-138);

(9) The death penalty is not the least restrictive

means of achieving the State's interest;

(10) The "depravity of mind" criterion for imposing the death penalty is vague, indefinite and overbroad. (Pet. 139).

X. The sentencing authority failed to make specific findings of fact essential to the penalty decision, i.e. the probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society in violation of petitioner's Eighth and Fourteenth Amendment rights. (Pet. 149-50).

XI. The petitioner was denied his constitutional right to counsel in violation of the Sixth, Eighth and Fourteenth Amendments and due process because of the arbitrary process used in Virginia to appoint counsel in capital cases which renders the adversary process unreliable. (Pet. 75):

(1) There is no reasonable, official mechanism in Virginia for timely appointment of trial counsel qualified to try a

capital murder case. (Pet. 76);

(2) Counsel appointed to defend petitioner did not have previous capital murder trial experience. (Pet. 80);

(3) Delayed appointment of counsel resulted in diminished memory of events and negation of the possibility of challenging police version of events. (Pet. 81, 83);

(4) By the time counsel was appointed to represent petitioner, he had a confused recollection of the sequence of events involving numerous police interrogations following his arrest. (Pet. 84);

(5) Separate counsel was appointed for each jurisdiction and petitioner was prejudiced by the failure of the separately appointed counsel to coordinate an effective pre-trial strategy. (Pet. 85);

(6) Petitioner's right to counsel should be deemed to have attached at the time of his first

> appearance before a magistrate because of the arbitrary, capricious, and prejudicial system for appointment of counsel in a capital murder case. (Pet. 86).

Upon mature consideration of these allegations of substantive trial error, the parties' pleadings and the argument of counsel heard in open court on April 23, 1987, the Court doth find that petitioner withdrew claims III (1) and (2) in his bill of particulars and claim V (1) in his memorandum in opposition. Upon consideration of petitioner's remaining substantive claims, the Court doth further find for the reasons stated in the respondent's motion to dismiss, his reply to petitioner's memorandum in opposition and his oral argument that all of petitioner's remaining non-ineffective counsel claims are

procedurally barred from habeas corpus consideration by the rules of Slayton v. Parrigan, 215 Va. 27, 205 S.E. 2d 680 (1974), cert denied, sub. nom., Parrigan v. Paderick, 419 U.S. 1108 (1975), or Hawks v. Cox, 211 Va. 91, 175 S.E. 2d 271 (1970).

Petitioner further made numerous allegations of ineffective assistance of counsel. These claims were, in substance, as follows:

> XII. Petitioner has denied his right to the effective assistance of counsel in that:
>
> (1) Counsel faiied to properly and adequately determine and develop petitioner's version of the facts:
>
> (a) Adequately investigate the relevant facts relating to petitioner's statements, the police search and evidence in mitigation;

(b) Interview relevant witnesses.

(2) Counsel was not adequately versed in relevant law. (Pet. 87);

(3) Counsel failed to make or adequately preserve timely and appropriate objections to the introduction of inadmissible evidence and to prejudicial conduct by the Court. (Pet. 87);

(4) Counsel failed to conduct an adequate voir dire and thereby failed to assure petitioner a trial before an impartial jury. (Pet. 87):

(a) Counsel failed to object or request clarifying instructions from the Court as to the burden on the prosecution during the sentencing trial. (Pet. 90);

(b) Counsel failed to adequately voir dire prospective jurors as to whether they had been interviewed by media representatives. (Pet. 91);

(4) Counsel failed to question Juror Hanger effectively to discover a basis for challenge for cause. (Pet. 92);

(5) Counsel failed to present viable defensive evidence and theories available to petitioner. (Pet. 87);

(6) Counsel failed to properly discredit damaging evidence presented by the State. (Pet. 87);

(7) Counsel failed to raise and to preserve objections at trial. (Pet. 87):

(a) Counsel failed to raise obviously viable issues on appeal. (Pet. 87);

(b) Counsel failed to adequately investigate relevant facts. (Pet. 87).

(8) Counsel failed to adequately investigate, coordinate and prepare a viable defense using favorable evidence brought out in other trials. (Pet. 88);

(9) Counsel failed to raise an objection or request a

corrective instruction with respect to prejudicial questioning by the prosecutor on voir dire regarding his burden of proof beyond a reasonable doubt at the sentencing trial. (Pet. 89);

(10) Counsel failed to adequately document the extensive media coverage and anxiety in Virginia regarding the Mecklenburg escape of several death row inmates in support of a motion for continuance. (Pet. 93);

(11) Counsel failed to adequately prepare for the cross-examination of the forensic pathologist who performed the autopsy on the victims in Williamsburg by conducting adequate research and adequately interviewing the witness. (Pet. 94);

(12) Counsel failed to recognize the necessity of a thorough investigation and to reasonably challenge circumstantial evidence on the question of admission of petitioner's confession into evidence. (Pet. 95);

(13) Counsel failed to properly object to the admission into evidence of articles discovered as a result of petitioner's involuntary statements. (Pet. 96);

(14) Counsel failed to raise an objection or request limiting instructions with respect to the irrelevant and cumulative testimony of the husband of one of the victims. (Pet. 97);

(15) Counsel failed to argue extenuating facts regarding the circumstances surrounding the videotaped confession. (Pet. 99);

(16) Counsel failed to object to the repetitious, unnecessary, and prejudicial replay of the Williamsburg confession during the penalty phase of the trial. (Pet. 100);

(17) Counsel failed to investigate and present to the sentencing authority relevant mitigating factors such as:

(a) The influence of Rev. Willie Wilson;

(b) Petitioner's activities with the Jaycees;

(c) Petitioner's remorse as expressed to Pastor Lawrence Louis;

(d) The effects on petitioner of medicine taken to alter his behavior. (Pet. 101);

(18) Counsel failed to request a poll of the jury on the verdict of guilt at the time said verdict was rendered by the jury. (Pet. 102);

(19) Counsel failed to make argument or present evidence to the Court of its consideration upon review of the jury sentence. (Pet. 103);

(20) Counsel failed to raise an objection or seek corrective instructions to the introduction of inflammatory and immaterial evidence of the murders in Newport News and Hampton during the sentencing trial. (Pet. 104);

(21) Counsel failed to present evidence in support of his contention that petitioner committed the crimes under an "extreme mental or emotional disturbance." (Pet. 105);

(22) Counsel failed to raise and preserve on appeal an objection to testimony presented by the prosecution in violation of the mandate of Doyle v. Ohio. (Pet. 106);

(23) Counsel failed to adequately interview before trial George Wakefield, a defense witness and failed to properly question that witness. (Pet. 107);

(24) Counsel did not raise and preserve on appeal an objection to the Court's failure to instruct the jury regarding the unadjudicated crimes proven during the sentencing trial. (Pet. 108, 120);

(25) Counsel failed to call Dr. Killian in the sentencing trial to describe petitioner's intelligence level. (Pet. 109);

(26) Counsel failed to raise and preserve on appeal an objection to or request corrective instructions regarding:

(a) The admissibility of petitioner's inculpatory statements to the police after his arrest on the ground that the police violated petitioner's right to counsel and right to remain silent under Miranda. (Pet. 110, 41-68);

(b) The admissibility of evidence obtained pursuant to an invalid search warrant. (Pet. 110, 11-22, 41-68);

(c) Virginia statutes implementing the death penalty. (Pet. 110, 122150);

(d) The prosecutor's reliance on evidence of aggravating circumstances not enumerated in the statute, to-wit: evidence of other crimes for which the petitioner had been

indicted but not convicted, which:

(i) Violated petitioner's constitutional entitlement to the presumption of innocence. (Pet. 110, 119b);

(ii) Violated petitioner's constitutional right not to be held to answer for a capital crime except upon indictment of a grand jury. (Pet. 110, 119c);

(iii) Irreparably inflamed the jury to the extent that they punished petitioner for all five murders and not for the specific murders committed within its jurisdiction. (Pet. 110, 119d);

(e) The trial court's failure to instruct the sentencing jury so as to negate the prejudice resulting

from admission of evidence of the other murders. (Pet. 110, 119e);

(f) The trial court's failure to instruct the jury on the presumption of innocence with respect to each of the unadjudicated charges. (Pet. 110, 120(1) (2);

(g) The trial court's failure to instruct the jury that the petitioner had the right to remain silent and that no inference could be drawn from his silence with respect to evidence of unadjudicated charges in another jurisdiction. (Pet 110, 123(3);

(27) Counsel failed to adequately cross-examine Detectives Browning and Spinner at the suppression hearing. (Pet. 111);

(28) Counsel failed to object to the admission into evidence of the conclusions of Dr. Wendell

Pile in the sentencing report to the Court. (Pet. 112);

(29) Counsel failed to have a qualified psychiatric expert review the video-taped confession. (Pet. 113);

(30) Counsel failed to adequately investigate and develop psychological evidence in mitigation. (Pet. 114):

(1) Petitioner's 1974 diagnosis as a schizophrenic With moderate mental retardation:

(2) Petitioner's hospitalization in 1965;

(3) Petitioner's psychological and physical characteristics of a "serial" murder.

Upon mature consideration of these allegations of ineffective assistance of counsel, the parties' pleadings and the argument of counsel heard in open Court on April 23, 1987, the Court doth find

that petitioner withdrew claims XIII (12) and (18) in his bill of particulars and claim XIII (22) in his memorandum in opposition.

Upon consideration of petitioner's remaining claims of ineffective assistance of counsel, the Court doth further find for the reasons stated in the respondent's motion to dismiss, his reply to petitioner's memorandum in opposition and his oral argument that petitioner's trial and appellate counsel acted in all instances complained of with the care and skill which a reasonably competent attorney would exercise under similar circumstances. See Stokes v. Warden, 226 Va. 111, 306 S.E. 2d 882 (1983); Strickland v. Washington, 466 U.S. 668 (1984). The Court further finds that in each such

instance of alleged ineffective assistance of counsel there is no reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different or that the sentence or the Supreme Court of Virginia would have concluded that the balance of aggravating and mitigating circumstances did not warrant a sentence of death. See Stokes v. Warden; Strickland v. Washington; Va. Dept. of Corrections v. Clark, 227 Va. 525, 318 S.E. 2d 399 (1984). It is, therefore

ADJUDGED and ORDERED that the record of the proceedings resulting in the petitioner's convictions for capital murder and his sentences of death be made a part of the record herein, and that the petition for a writ of habeas

corpus be, and is hereby, denied and dismissed without an evidentiary hearing, to which action of this Court petitioner's exception is noted.

The Clerk is directed to forward certified copies of this Order to petitioner's counsel, Catherine N. Currin, Esquire, to the respondent and to his counsel, Richard B. Smith, Assistant Attorney General.

Enter: This 7th day of May, 1987

SYVASKY LAFAYETTE POYNER

v.

TONI V. BAIR, WARDEN,
Mecklenburg Correctional Center

At Law No. 180-FB
CIRCUIT COURT OF
THE CITY OF NEWPORT NEWS
(Final Order dated 22 May 1987)

This case came to be heard upon the petition for a writ of habeas corpus of Syvasky Lafayette Poyner, as supplemented with his bill of particulars. Thereafter, the respondent moved the Court to dismiss the petition, to which motion the petitioner responded in his memorandum in opposition and to which memorandum the respondent filed his reply. The petition, as

supplemented by the bill of particulars, presented the following allegations of substantive trial court error:

I. The trial court incorrectly denied petitioner's motion to suppress inculpatory statements taken during police interrogation:

(1) The statements were obtained during illegal police interrogations after he had invoked his constitutional right to have an attorney present and to remain silent;

(2) The statements were induced by direct and implied coercion on the part of the police;

(3) The statements were involuntarily made to the police, and the Commonwealth failed to meet the heavy burden of proving the petitioner fully, intelligently, voluntarily, and knowingly waived his rights;

(4) The later inculpatory statements were causally connected to the initial coercive confession and should have been

suppressed, including the videotaped confession;

(5) Petitioner should have been advised of Miranda rights prior to the admission of all non-Hedrick murders.

II. The trial court improperly failed to suppress the evidence obtained by the police as a result of an invalid search warrant:

(1) The warrant did not particularize the area to be searched;

(2) The warrant was based upon information obtained from petitioner in violation of his right to remain silent.

III. The circumstances of the appointment of counsel were so arbitrary, untimely, and otherwise prejudicial as to warrant a presumption that the adversary process was wholly unreliable:

(1) No reasonable official mechanism exists in Virginia for timely appointment of qualified counsel for capital murder cases;

(2) Delayed appointment of counsel resulted in the diminished memory of events and negation of the possibility of challenging the police version of events;

(3) Separate counsel was appointed for each jurisdiction, resulting in a failure to coordinate pretrial investigation and trial strategy;

(4) The right to counsel attached at the time of the first appearance before a judicial officer.

IV. Petitioner was denied a fair trial and due process of law because:

(1) The court improperly permitted the prosecutor to solicit testimony that implicitly used the petitioner's assertion of his constitutional right to remain silent against him;

(2) The court erred in failing to strike the evidence at the close of the state's case and at the close of all the evidence;

(3) The court erred by failing to respond to the jury's request for a definition of "what life imprisonment means;" and in improperly refusing instruction "I;"

(4) The court erred in denying petitioner's request for a mistrial based on its decision not to respond to the jury's question;

(5) The court improperly permitted admission of evidence which was inflammatory:

(a) The court improperly permitted photographs of victims from the four other capital cases admitted into evidence;

(b) The court improperly permitted testimony into evidence describing the crime scenes of the other capital murders;

(c) The court failed to instruct the jury in order to preclude such prejudice;

(d) The court erred in permitting the prosecution to play

the videotape twice during the guilt phase.

(6) The court erred in failing to adequately question a juror regarding out-of-court discussions with her psychologist;

(7) The court erred in admitting evidence of convictions then pending appeal;

(8) The court erred in refusing defense instruction "G";

(9) The Commonwealth's attorney improperly argued in closing that "we [do not] want you to give him life for sympathy because of any other factors;"

(10) Effective voir dire was precluded due to the state system of a single jury trial for both phases of a capital case;

(11) The court failed to make specific findings of fact in regard to the basis of the death penalty decision;

V. Since petitioner was tried and forced to defend the five separate offenses in Williamsburg, the State of Virginia had its one "bite of the apple." Having taken the opportunity to try and then to convict and punish petitioner for these offenses, Virginia went on to take "three bites of the apple" in violation of petitioner's right to be free of being twice placed in jeopardy of punishment for the same offenses.

VI. The Virginia death penalty statute is unconstitutional:

(1) The death penalty is a cruel and unusual punishment in all circumstances;

(2) The death penalty imposed here is disproportionate and excessive;

(3) The provision of the Virginia Code permitting the death penalty based upon a finding of "future dangerousness" is unconstitutionally vague;

(4) The death penalty as administered in the Commonwealth of Virginia results in a pattern and practice of arbitrary and

capricious capital sentencing and does not serve the supposed penological justification of retribution and deterrence;

(5) The petitioner's death sentence was imposed under a sentencing statute that left the jury with unguided discretion to impose the death penalty as it pleased;

(6) Petitioner's rights were denied by the Commonwealth's failure to provide a reasonable alternative to the sentence of death because:

(a) The statutory provisions for parole in capital murder cases do not allow a reasonable alternative to the sentence of death;.

(b) The state provides no explicit definition of "life" imprisonment in a capital case.

(7) The Virginia death penalty statute is unconstitutional because it deprives petitioner of

the fundamental right to life and does not serve a compelling state interest;

(8) The Virginia death penalty statute violates the petitioner's right to privacy;

(9) The Virginia death penalty statute is not the least restrictive means of achieving the compelling interests of the state.

Upon mature consideration of these allegations of substantive trial court error, the parties' pleadings, and the argument of counsel heard in open court on March 26, 1987, the Court doth find for the reasons stated in the respondent's motion to dismiss, and his reply to petitioner's memorandum in opposition that all of petitioner's non-ineffective counsel claims are procedurally barred from habeas corpus consideration. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert.

denied, sub. nom , Parrigan v. Paderick, 419 U.S. 1108 (1975); Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970).

Petitioner further made numerous allegations of ineffective assistance of counsel. These claims are, in substance, as follows:

VII. Petitioner was not afforded effective representation by his trial counsel. Generally, counsel was not prepared for trial, did not adequately develop or investigate the evidence, was not adequately versed in the law, did not properly discredit the State's evidence, and failed to raise and preserve objections for appeal.

Specifically, counsel was ineffective for the following reasons:

(1) Counsel failed to admit evidence that the petitioner had been drinking prior to his arrest;

(2) Counsel failed to develop such facts as Poyner's refusal to be tape

recorded or to allow the detectives to take notes; Poyner's fabrications; Poyner's belief he could not have an attorney until after the weekend; or that he requested to call his wife;

(3) Counsel, trial and appellate, failed to argue that police interrogation continued after Poyner stated, "that's all I want to say about it;"

(4) Counsel, trial and appellate, failed to argue that Miranda warnings should have been given prior to interrogation on non-Hedrick murders; and failed to argue the causal link between the confessions;

(5) Counsel, trial and appellate, failed to argue the evidence of Poyner's attempted suicide;

(6) Counsel, trial and appellate, failed to argue that Poyner's request for an attorney was not a request for clarification of his rights;

(7) Counsel failed to properly object to the Court's

refusal to answer the juror's question regarding life imprisonment;

(8) Counsel failed to properly object to the admission into evidence of the photos of the victims of the non-Ripple murders and of the descriptions of the non-Ripple crime scenes;

(9) Counsel failed to object to the evidence of other crimes on the grounds of double jeopardy;

(10) Counsel, trial and appellate, failed to properly argue that the Virginia capital murder statutes are unconstitutional;

(11) Counsel failed to object that the Court failed to make specific findings of fact in regard to the basis of the death penalty decision;

(12) Counsel had an inadequate understanding of the conditions upon which the death penalty could be imposed;

(13) Counsel failed to interview relevant witnesses;

(14) Appellate counsel failed to present a complete and coherent statement of the facts;

(15) Appellate counsel failed to claim the ineffectiveness of trial counsel;

(16) Counsel failed to object to admission of articles discovered as a result of involuntary statements;

(17) Counsel failed to object to testimony of the husband of a victim;*

(18) Counsel failed to object to the replay of the confessions in the penalty phase and the showing of the videotape twice in the guilt phase;

(19) Counsel (trial and appellate) failed to object to the admission of evidence obtained pursuant to an invalid search warrant;

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*The petitioner voluntarily withdrew allegations (12) and (17) regarding ineffective assistance of counsel before the Court's dismissal of the petition.

(20) Counsel failed to object to testimony of Ms. Ripple's mother;

(21) Counsel failed to conduct an adequate voir dire:

(a) Failed to find out the substance of information obtained from the media;

(b) Failed to question as to racial bias;

(c) Failed to object to entire venire;

(22) Counsel failed to present viable defensive evidence and theories available to petitioner; to the extent that evidence favorable to petitioner was not brought out in Newport News but was at other trials, counsel failed to adequately investigate and prepare a viable defense;

(23) Counsel failed to call Dr. Killian in the penalty phase to describe petitioner's intelligence level;

(24) Counsel failed to adequately prepare witnesses for the penalty

phase, specifically T. Sellers and Dr. Dimitris;

(25) Counsel failed to adequately present psychological makeup as evidence in mitigation;

(26) Counsel failed to argue extenuating facts regarding the circumstances surrounding the videotaped confession;

(27) Counsel failed to have a qualified psychiatric expert preview the videotape;

(28) Counsel failed to investigate and present mitigating factors;

(29) Counsel, trial and appellate, failed to make an objection to testimony presented by the prosecution in violation of Doyle v. Ohio;

(30) Counsel (trial and appellate) failed to investigate and follow-up on a prewarrant police search of petitioner's residence;

(31) Counsel failed to question a juror who in the course of the penalty phase

consulted psychiatric help;

(32) Counsel failed to adequately cross examine Detectives Spinner and Browning as to petitioner's assertion of his constitutional right to counsel and to remain silent by failing to bring out inconsistencies between testimony at the hearing and earlier statements at the Williamsburg trial:

(a) Failed to challenge the validity and accuracy of the police report;

(b) Failed to demand the notes used by Detective Browning;

(c) Failed to contradict Detective Spinner's statement that Poyner had not requested an attorney.

Upon mature consideration of these allegations of ineffective assistance of counsel, the parties' pleadings, and the argument of counsel heard in open Court

on March 26, 1987, the Court doth find for the reasons stated in the respondent's motion to dismiss, and his reply to petitioner's memorandum in opposition that petitioner's trial and appellate counsel acted in all instances complained of with the care and skill which a reasonably competent attorney would exercise for similar services under the circumstances. Stokes v. Warden, 226 Va. 111, 306 S.E.2d 882 (1983); Strickland v. Washington, 466 U.S. 668 (1984). The Court further finds that in each such instance of alleged ineffective assistance of counsel there is no reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different or that the sentencer or Supreme Court of

Virginia would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland v. Washington supra.

It is, therefore,

ADJUDGED and ORDERED that the proceedings resulting in the petitioner's convictions for capital murder, robbery and illegal use of a firearm and resulting sentences be made a part of the record herein, and that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, without an evidentiary hearing, to which action of this Court petitioner's exceptions are noted.

The Clerk is directed to forward certified copies of this Order to petitioner's counsel, Catherine N.

Currin, and to Katherine B. Toone, Assistant Attorney General.

Enter this 22nd day of May, 1987.

SYVASKY LAFAYETTE POYNER

v.

TONI V. BAIR, WARDEN,
Mecklenburg Correctional Center

At Law No. 20843
Circuit Court for the City of Hampton
(Final Order dated 29 May 1987)

This case came to be heard upon the petition for a writ of habeas corpus of Syvasky Lafayette Poyner, as supplemented with his bill of particulars. The respondent thereafter moved the Court to dismiss the petition, to which motion the petitioner responded with his memorandum in opposition and to which memorandum the respondent filed his reply. The petition, as subsequently clarified by the

petitioner, presented the following allegations of substantive trial error:

I. The trial court incorrectly denied petitioner's motion to suppress his inculpatory statements taken during police interrogation:

(1) The statements were obtained during illegal police interrogations after he had invoked his constitutional right to have an attorney present and to remain silent;

(2) The statements were induced by direct and implied coercion on the part of the police;

(3) The statements were involuntarily made to the police, and the Commonwealth failed to meet the heavy burden of proving the petitioner intelligently, voluntarily, and knowingly waived his rights;

(4) The later inculpatory statements were causally connected to the initial coercive confession and should have been suppressed, including the videotaped confession;

(5) Petitioner should have been advised of the Miranda rights prior to the admission of all non-Hedrick murders.

II. The trial court improperly failed to suppress the evidence obtained by the police as a result of an invalid search warrant:

(1) The warrant did not particularize the area to be searched;

(2) The warrant was based upon information obtained from petitioner in violation of his right to remain silent.

III. The trial court failed to determine if petitioner's waiver of a jury trial and agreement to stipulated evidence was knowing, intelligent, and voluntary.

IV. The "errors" of petitioner's counsel, the prosecutor, and the court substantially prejudice petitioner's right to due process of law.

V. The Commonwealth failed to prove beyond a reasonable doubt that petitioner raped Mrs. Hedrick.

VI. The circumstances of the appointment of counsel were so arbitrary, untimely, and otherwise prejudicial as to warrant a presumption that the adversary process was wholly unreliable:

(1) No reasonable official mechanism exists in Virginia for timely appointment of qualified counsel for capital murder cases;

(2) Delayed appointment of counsel resulted in the diminished memory of events and negation of the possibility of challenging the police version of events;

(3) Separate counsel was appointed for each jurisdiction, resulting in a failure to coordinate pretrial investigation and trial strategy;

(4) The right to counsel attached at the time of the first appearance before a judicial officer;

(5) Poyner was prejudiced because he was appointed separate counsel in each jurisdiction.

VII. Since petitioner was tried and forced to defend the five separate offenses in Williamsburg, the Commonwealth had its one "bite of the apple." Having taken the opportunity to try and then to convict and punish petitioner for these offenses, Virginia went on to take "three bites of the apple" in violation of petitioner's right to be free of being twice placed in jeopardy for the same offenses.

VIII. Petitioner was denied a fair trial and due process of law because:

(1) The court erred in allowing the presentation of evidence of petitioner's other murders outside Hampton, which inflamed the jury;

(2) The prosecutor introduced petitioner's inculpatory statements to the treating State psychiatrist at the sentencing phase;

(3) Counsel was precluded from an effective voir dire because of Virginia's "single jury" system.

IX. The Virginia death penalty statute is unconstitutional:

(1) The death penalty is a cruel and unusual punishment in all circumstances;

(2) The death penalty imposed here was disproportionate and excessive:

(3) The provision of the Virginia Code permitting the death penalty based upon a finding of "future dangerousness" is unconstitutionally vague;

(4) The death penalty as administered in the Commonwealth of Virginia results in a pattern and practice of arbitrary and capricious capital sentencing and does not serve the supposed penological justification of retribution and deterrence;

(5) The petitioner's death sentence was imposed under a sentencing statute that left the jury with unguided discretion to impose the death penalty as it pleased;

(6) Petitioner's rights were denied by the Commonwealth's failure to provide a reasonable

alternative to the sentence of death because:

(a) The statutory provisions for parole in capital murder cases do not allow a reasonable alternative to the sentence of death;

(b) The State provides no explicit definition of "life imprisonment" in a capital case;

(7) The Virginia death penalty statute is unconstitutional because it deprives petitioner of the fundamental right to life and does not serve a compelling state interest;

(8) The Virginia death penalty statute violates the petitioner's right to privacy;

(9) The Virginia death penalty statute is not the least restrictive means of achieving the compelling interests of the state.

(10) The "depravity of mind" criterion for imposing the death penalty is vague, indefinite and overbroad.

X. The trial judge failed to make specific findings of fact in regard to the basis of his death penalty decision.

XI. Numerous circumstances present in petitioner's case, within and outside of the trial record, support the claim that death is a disproportionately severe and therefore excessive punishment in his case.

Upon mature consideration of these allegations of substantive trial error, the parties' pleadings and the argument of counsel heard in open court on May 6, 1987, the Court doth find that petitioner withdrew claim VIII(1) in his bill of particulars and claim VIII(3) in his memorandum in opposition. Upon consideration of petitioner's remaining substantive claims, the Court doth further find for the reasons stated in the respondent's motion to dismiss, his reply to petitioner's memorandum in opposition and his oral argument that

all of petitioner's remaining non-ineffective counsel claims are procedurally barred from habeas corpus consideration by the rules of Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, sub nom., Parrigan v. Paderick, 419 U.S. 1108 (1975), or Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970).

Petitioner further made numerous allegations of ineffective assistance of counsel. These claims were, in substance, as follows:

XII. Petitioner was not afforded the effective representation of counsel. Using petitioner's numbering scheme for uniformity, his claims are substantially as follows:

(63) Counsel failed to:

(1) Adequately investigate the case;

(2) Become adequately versed in the law;

(3) Make and preserve objections to inadmissible evidence and to the Court's prejudicial conduct;

(4) Conduct an adequate jury voir dire;

(5) Present viable defense evidence and theories;

(6) Properly discredit damaging evidence;

(7) Raise and preserve appeal issues;

(64) Counsel failed to adequately investigate, coordinate and prepare with evidence from other trials;

(65) Counsel failed to recognize and object to certain circumstantial evidence;

(66) Counsel failed to object to evidence discovered as a result of an illegal investigation;

(67) Counsel failed to argue extenuating circumstances about the videotaped confession;

(68 Counsel failed to investigate and present evidence in mitigation:

(1) The influence of Rev. Willie Wilson;

(2) Poyner's activities with the Jaycees;

(3) Poyner's remorse as expressed to Pastor Lawrence Lewis;

(4) The effects on Poyner of medicine taken to alter his behavior;

(69) Counsel failed to have a psychiatrist review the videotape;

(70) Counsel failed to adequately investigate and develop psychological evidence in mitigation:

(a) Diagnosed as schizophrenic in 1974;

(b) Hospitalized in 1965;

(c) Characteristics of a "serial murderer";

(71) Counsel failed to raise:

(a) An objection to Poyner's confession;

(b) an objection to the search of 126 Poplar Avenue;

(72) Counsel failed to file motion papers until the day before trial and then they were almost verbatim copies of the ones filed in Williamsburg;

(73) Counsel failed to adequately cross-examine Detectives Browning and Spinner at the suppression hearing;

(74) Counsel was not sufficiently familiar with the law to answer the judge's question at the suppression hearing;

(75) Counsel failed to advise petitioner of the ramifications of the stipulation at the suppression hearing;

(76) Counsel failed to challenge the stipulation at the suppression hearing;

(77) Counsel failed to make a full and adequate record of the trial;

(77a) Counsel failed to object to evidence of blood

characteristics in the Commonwealth's stipulation of evidence;

(78) Counsel failed to present an opening statement at the sentencing hearing;

(79) Counsel failed to object to the "irrelevant" testimony of Becky Robinson;

(80) Counsel introduced the possibility that Poyner would be dangerous to other prisoners;

(81) Counsel failed to put on evidence of the statutory definition of life imprisonment under petitioner's circumstances;

(82) Counsel failed to raise a double jeopardy challenge;

(83) Counsel failed to object to Elmer Kee's testimony about a statement to him by Poyner;

(84) Counsel failed to object to Elmer Kee's conclusions that Poyner had lived near where Mrs. Hedrick's body was found;

(85) Counsel failed to object to evidence about Poyner's emotionless reading of a newspaper article about one of his murders;

(86) Counsel failed to object to evidence of an uncharged crime and of crimes on appeal;

(87) Counsel failed to consider the timing of Poyner's trial in Hampton;

(88) Counsel failed to object to Poyner's statement about the uncharged purse theft;

(89) Counsel failed to object to the use of the videotaped confession;

(90) Counsel failed to properly prepare the principal witness;

(91) Counsel failed to object to the introduction of Poyner's statements to the treating psychiatrist;

(92) Counsel encouraged Poyner to allow the Court to try him without a jury and upon stipulated facts;

(93) Counsel failed to call Dr. Killian at the sentencing phase;

(94) Counsel on appeal was unfamiliar with the suppression hearing record; and

(95) Counsel on appeal confused and diluted his Miranda arguments.

Upon mature consideration of these allegations of ineffective assistance of counsel, the parties' pleadings and the argument of counsel heard in open court on May 6, 1987, the Court doth find that petitioner withdrew claim XIII (63)(4) in his memorandum in opposition and XIII (63)(90) in his bill of particulars. Upon consideration of petitioner's remaining claims of ineffective assistance of counsel, the Court doth further find for the reasons stated in the respondent's motion to dismiss, his reply to petitioner's memorandum in

opposition and his oral argument that petitioner's trial and appellate counsel acted in all instances complained of with the care and skill which a reasonably competent attorney would exercise under similar circumstances. See Stokes v. Warden, 226 Va. 111, 306 S.E.2d 882 (1983); Strickland v. Washington, 466 U.S. 668 (1984). The Court further finds that in each instance of alleged ineffective assistance of counsel there is no reasonable probability that, but for counsels' alleged errors, the result of the proceeding would have been different or that the sentencer or the Supreme Court of Virginia would have concluded that the balance of aggravating and mitigating circumstances did not warrant a sentence of death. See Stokes v.

Warden; Strickland v. Washington; Va. Dept. of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984). It is, therefore

ADJUDGED and ORDERED that the record of the proceedings resulting in the petitioner's convictions for capital murder and his sentences of death be made a part of the record herein, and that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed without an evidentiary hearing, to which action of this Court petitioner's exception is noted.

The Clerk is directed to forward certified copies of this Order to petitioner's counsel, Catherine N. Currin, Esquire, to the respondent and to his counsel, Richard B. Smith, Assistant Attorney General.

Enter this 29th day of May, 1987.

IN THE CIRCUIT COURT FOR THE
CITY OF WILLIAMSBURG AND THE
COUNTY OF JAMES CITY

COMMONWEALTH

vs.

SYVASKY LAFAYETTE POYNER

M O T I O N

Now comes the accused, by counsel, and moves the Court to suppress any and all evidence seized as a result of a search conducted on or about February 4, 1984 of the premises briefly described as 126 Poplar Avenue, Newport News, Virginia, said search being illegal and in violation of the accused's constitutional rights.

WHEREFORE, the accused requests that an Order be entered suppressing the evidence wrongfully seized.

SYVASKY LAFAYETTE POYNER

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART I

COMMONWEALTH OF VIRGINIA

v.

SYVASKY LAFAYETTE POYNER

M O T I O N

Now comes the accused, by counsel, and moves the Court to supress all statements made by him, either orally or in writing or on videotape, to any investigating officer, jailer or other law enforcement or corrections personnel, and states as follows:

All statements were obtained from him in violation of the rights afforded him by the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, in that all of these statements were made without

counsel present, the accused having made a request for an attorney.

SYVASKY LAFAYETTE POYNER

"Supporting Facts" in Petition for Writ of Habeas Corpus in Williamsburg (Paragraphs 43, 44, 45, 46) and in Hampton and Newport News (Paragraphs 24, 25, 26, 27)

24. At the time of his arrest, petitioner had an intelligence level that put him in the fifth to eighth percentile of the population. In other words, in a ranking of 100 people as to their intelligence, he would be fifth to eighth from the bottom. This unchallenged conclusion was based upon a series of tests of petitioner conducted over a nine year period.

25. Upon information and belief: Petitioner did not go to work on Friday, February 3, 1984. During the late afternoon, he walked from his residence about three blocks to "Sonny's" bar on 25th Street in Newport News. According to the waitress at Sonny's, he drank

three to four "tall" beers. He left the bar and took a walk during which he bought some cigarettes and stopped and had another beer. He went back to Sonny's at about 9:00 p.m., and drank beer until approximately midnight when he walked home. Petitioner did not eat from the time of his first visit to Sonny's until he was in police custody. Petitioner was arrested within ten minutes of his arrival at his home.

26. Petitioner was arrested on a warrant sworn to by Detective C.D. Spinner on the charge of the capital murder of Carolyn Hedrick in Hampton, Virginia. Petitioner's arrest took place at his residence in Newport News at approximately one o'clock in the morning of Saturday, February 4, 1984. Detective E. Browning of the Hampton

City Police arrested petitioner and took him to the Detective Bureau of the third floor of the Newport News Police Headquarters, arriving at about 1:35 a.m. At that time, Detective Spinner executed the Hampton arrest warrant advised petitioner of his Miranda rights and took him before a magistrate who ordered him held without bond. Petitioner was then returned to the third floor detective bureau at about 1:50 a.m.

27. Detective Spinner advised petitioner of certain rights at about 2:00 a.m. This was the second and last time any statement of rights was given petitioner during this evening. The rights were given orally and no written rights waiver was executed.

"Supporting Facts" in Petition for Writ of Habeas Corpus in Newport News (Paragraphs 39-48, 50, 51)

39. At the initial interrogation, petitioner asserted his right to counsel and to remain silent by his statement "Didn't you tell me I had a right to an attorney?" as soon as the police began to question him. If petitioner had been seeking to clarify his rights, he would have done so when the rights were read on either of the two prior occasions and not after the factual confrontation and coercive threat by the police of his having to confront his friends as liars.

40. The police deliberately ignored petitioner's assertion of his right to counsel and to remain silent and forcefully pressed on with the interrogation even though petitioner had only initiated a brief response limited

to only those facts necessary to counter the coercive threat by the police.

41. Petitioner did not by his initiation of a brief, complete-in-itself statement to the police on a limited issue specifically raised in a coercive manner by the police waive his asserted right to counsel.

42. The police understood his statement regarding his right to counsel as an assertion of that right. At the least, any ambiguity in the remark required the officers to clarify the situation before proceeding with any interrogation. United States v. Riggs, 537 F.2d 1219, 1222 (4th Cir. 1976).

43. As the initial interrogation continued, petitioner again asserted his right to remain silent by unequivocally

telling the officer "that's all I want to say about it." This statement was again ignored by the officers.

44. The circumstances surrounding the initial interrogation on the Hedrick murder clearly show that petitioner had no intention of waiving his constitutional rights. He refused to be tape recorded, gave direction that no notes be taken, used fabrications, believed that he could not have an attorney until after the weekend, and requested to call his wife, etc. See Paragraphs 22-38.

45. Petitioner should have been advised of his Constitutional rights as protected by Miranda before he was interrogated regarding the Williamsburg, Newport News and other Hampton (not Hedrick) murders.

46. Each of petitioner's statements to the police following the initial coerced interrogation, to include the videotaped confession were either explicitly linked by police conduct to that interrogation or, given the circumstances of petitioner's intelligence, prolonged incarceration without counsel after having requested one, and repetitious police interrogatories, etc., causally connected to that interrogation as to require suppression.

Doyle v. Ohio Violated

47. The trial court improperly permitted the prosecutor to elicit testimony that implicitly used petitioner's assertion of his constitutional right to remain silent

against him. Doyle v. Ohio 426 U.S. 610 (1976).

Supporting Facts

48. Petitioner did not waive his constitutional rights to counsel and to remain silent.

49. The prosecution purposefully and improperly elicited testimony at trial that specifically referred to petitioner's silence after his assertion of those rights when Detective Spinner in an unresponsive answer to petitioner's question on cross examination, told the jury, "But the other murders that was involved, he didn't admit to them until later on in the morning hours". Newport News Sentence: 280. The prosecutor then followed with a bolstering question on redirect. Newport News Sentence: 282.

Petitioner Deprived of Due Process

50. The errors of petitioner's counsel, the prosecutor and the court at trial substantially prejudiced petitioner's right to due process under the United States Constitution and constituted, individually and cumulatively, egregious error.

State's Failure to Prove Case

51. The trial court erred in failing to strike the evidence at the close of the state's case and at the close of all evidence since, once the confessions and fruits of those confessions were correctly excluded, the state failed to meet its burden of proof as to petitioner's guilt.

WITNESS STATEMENT

NAME Syvasky Lafayette Poyner
RACE B SEX M AGE 27
DATE OF BIRTH
SOCIAL SECURITY #
ADDRESS 126 Poplar Ave., Newport News, Va.
PHONE PLACE OF EMPLOYMENT

HOURS PHONE
ALTERNATE CONTACT
PHONE
OFFENSE Capital Murder DATE 2/2/84
STATEMENT TAKEN BY Det. C. D. Spinner
Det. E. A. Browning
DATE 2/4/84 TIME Approx. 0620 a.m.
PLACE Detective Bureau, Newport News Police Department

STATEMENT:

Spinner: OK, what I'm going to do right now Lafayette, is that what you want to be called?

Poyner: Yes.

Spinner: Lafayette, what I'm going to ask you right now, I'm going to advise you of your constitutional rights and I want to make sure that you understand them. You understood your rights earlier this morning, correct?

Poyner: Right.

Spinner: After I advised you of your rights back around 0100 this morning....

Poyner: Right.

Spinner: You told me you wanted to talk to a lawyer.

Poyner: That's correct.

Spinner: But as you was getting up from your chair, you says, "Wait a minute. I'd like to talk to you and tell you about the murder that I did on 43rd Street." Correct?

Poyner: Correct.

Spinner: Knowing that your rights was in mind, and that you had stated that you wanted to talk to a lawyer, at that time, you stated that you wanted to go ahead and tell me about that murder anyway, and you stopped and voluntarily told me this, correct?

Poyner: Yes sir.

Spinner: When you said you was going to tell me about the murder, what did you mean, you wanted to tell me. Can you tell me briefly about the murder?

Poyner: I wanted to confess.

Spinner: And this is the murder that happened in the uh, that a body found was nude and a lady by the name of Carol Hedrick that was abducted in the city of Hampton, you stated?

Poyner: Yes sir.

Spinner: And can you tell me whereabouts in Hampton she was abducted?

Poyner: On Pembroke Avenue parked in front of Chic-A-Sea.

Spinner: Is this next to the Pantry Pride?

Poyner: Yes sir.

Spinner: And where did you drive to have her, where you shot her?

Poyner: On the nex-t street.

Spinner: OK, and when you left there you went up to Shield Rd. and made a right?

Poyner: Yes sir.

Spinner: And did you voluntarily go over there with Detective Browning and myself and show us what route you took?

Poyner: Yes sir, I did.

Spinner: And the route you took, did it

end up behind a church in the 600 block of 43rd Street in Newport News?

Poyner: Yes sir, it did.

Spinner: And the gun that you used on her, is this the gun that you left at your house at 126 Poplar Avenue?

Poyner: Yes sir.

Spinner: Alright, now the lady that was shot at the High's Store, Ice Cream Store, is this the lady you were telling me about that you was riding down Warwick Blvd. and you observed her in the High's Ice Cream Store by herself?

Poyner: Yes sir.

Spinner: And the reason why you went in there was that you went in there to rob her? Poyner: Yes sir.

Spinner: And tell me briefly what you did when you went into High's?

Poyner: I went in the store, she was turning around washing off the counter, and I told her, I say, I want your money. She gave it to me.

Spinner: And did she open the cash register for you?

Poyner: Yes sir.

Spinner: And what did you do then?

Poyner: She then put the money in the bag.

Spinner: And then what did you do?

Poyner: She got in the corner. That's when I shot her.

Spinner: OK, now the two ladies in Williamsburg. How did you end up in Williamsburg?

Poyner: I drove up there.

Spinner: In what car?

Poyner: A Buick.

Spinner: Dark brown?

Poyner: Yes sir.

Spinner: OK, what made you go to this motel?

Poyner: Just impulse.

Spinner: And what did you do with these two ladies?

Poyner: They was in the kitchen, so when they turned around and faced the counter I shot 'em.

Spinner: And did you shoot both of them in the head?

Poyner: Yes sir.

Spinner: And this is the same weapon that was found at 126 Poplar Avenue in Newport News?

Poyner: Yes sir.

Spinner: And did you take anything from them?

Poyner: Just money.

Spinner: And how much money?

Poyner: About forty or fifty dollars, I guess.

Spinner: Alright, how about the lady at the S & E Salon in Hampton. Did you go into that Beauty Salon?

Poyner: Yes sir.

Spinner: And what did you do there?

Poyner: I robbed her.

Spinner: And how much money did you take?

Poyner: About thirty, thirty five, forty dollars.

Spinner: And what did you do to her?

Poyner: I shot her.

Spinner: In the head?

Poyner: Yes sir.

Spinner: And that's with the gun that was recovered at 126 Poplar Avenue?

Poyner: Yes sir.

Spinner: And what kind of automobile was you driving when you went there?

Poyner: A late model Ford.

Spinner: Are you involved in any other shootings in Newport News, Williamsburg or Hampton?

Poyner: No sir.

Spinner: Are you involved in any shootings that occurred in York County with a .25 automatic?

Poyner: No sir.

Spinner: Are you involved where two men were sitting in a car, one at 25th and Roanoke and one at 25th and Parrish where they were shot through a window?

Poyner: No sir.

Spinner: Why are you telling me all this?

Poyner: Cause I feel, well, I'm gonna

be gone for a long time, possibly the rest of my life so I might as well get it off my chest. I know I need help.

Spinner: OK, the time right now is 0628 a.m. on February 4th. Did you voluntarily give this statement on your own without any threats or promises by this detective?

Poyner: Yes sir.

_____

Detective E. A. Browning
Hampton Police Department

_____

Detective C. D. Spinner
Newport News Police Department

C. Petitioner's Confession Should Have Been Suppressed

12. Petitioner's Fifth and Fourteenth Amendment rights under the United States Constitution and his rights under the Virginia Constitution were violated when his inculpatory statements were admitted at trial as direct evidence of guilt and: . . .

C. Petitioner's Confession Should Have Been Suppressed

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C. Petitioner's Confession Should Have Been Suppressed

12. Petitioner's Fifth and Fourteenth Amendment rights under the United States Constitution and his rights under the Virginia Constitution were violated when his inculpatory statements were admitted at trial as direct evidence of guilt and: . . .

CASE INVESTIGATIVE NOTES

CASE NAME: TASK FORCE - Murder Investigations

COMPLAINT NO.: _____

DATE RECEIVED: 2/6/84

CASE STATUS: ASSIGNED: _____ FILE: _____

OTHER: _____

Notes compiled by Detective E. A. Browning and Detective C. D. Spinner in reference to Syvasky Lafayette Poyner.

On February 3rd, 1984 at 7:22 p.m., a warrant was sworn by Detective C. D. Spinner of the Newport News Police Department for capital murder for the arrest of Syvasky Lafayette Poyner of 126 Poplar Avenue, Newport News, Virginia. Date of Birth: 4-7-56, Black Male, 5'10", 177 lbs., Social Security No. 229-88-6212 in connection with the death of Carolyn Hedrick of 65 Azalea Drive, Hampton, Virginia on February 2, 1984.

On February 4, 1984 at approximately 0100 a.m., the defendant was arrested at 126 Poplar Avenue, Newport News, Virginia by Sergeant Brent Husgrove and Detective E. A. Browning of the Hampton

Detective E. A. Browning Hampton Police Department	Detective C. D. Spinner Newport News Police Department

Police Department with the assistance of Detectives from the Newport News Police Department.

The warrant was served on the defendant at 0140 a.m. in the Detective Bureau of the Newport News Police Department by Detective C. D. Spinner in the presence of Detective E. A. Browning. After the warrant was served the defendant was taken directly to the Magistrate, Mr. Ford, at which time the Magistrate advised Mr. Poyner of the charges and that he would be held without bond.

Statement made by the defendant in the presence of Detective E. A. Browning in the Detective Bureau Office was as follows:

"If this goes through it means a life sentence."

The above statement was made after being brought back from the Magistrate's Office.

The defendant was removed from the handcuffs in the Detective Bureau Office by Detective Spinner, and at approximately 0150 a.m. the defendant was advised of his rights orally by Detective Spinner in the Detective Bureau Office with Detective Browning present.

Detective E. A. Browning Hampton Police Department -195-	Detective C. D. Spinner Newport News Police Department

He was advised he was under arrest for capital murder. (1) You have the right to remain silent, (2) Anything you say can and will be used against you in a court of law, (3) You have the right to have an attorney present before any questioning if you wish one, (4), If you cannot afford an attorney, the court is empowered to appoint one to represent you.

Detective Spinner asked the defendant if he understood his rights and he answered, "Yes".

Detective Spinner then continued advising Mr. Poyner on information that he had learned from Mr. David Doswell who operates a barber shop in the 600 block of 25th Street. Also, he was advised that he had already been identified by people in the barber shop as operating a maroon top and white bottom Olds, the day before between the hours of 1:30 p.m. and 2 o'clock p.m in the 600 block of 25th Street, and had tried to sell some boxes of Peter Paul candy, and that he had given one of the employees two boxes of candy from the Olds. Also, he was advised that we had found the candy which had been given to two customers and it was the same brand, Peter Paul, that was in Carolyn Hedrick's automobile. I then told Mr. Poyner if he wanted his friends from the

barber shop to have to come to court and tell what they know about him and the Oldsmobile and candy, that he would be the one that would have to face them.

Spinner: (Q) Do you have anything you want to say?

Poyner: (A) Didn't you tell me I had the right to an attorney?

Spinner: (A) Yes, you have the right to an attorney.

At that time, Detective Spinner and Detective Browning started getting up, and Mr. Poyner made the statement, "Let me tell you about the car."

The above detectives sat back down and he proceeded to tell us that he was in the 600 block of 25th Street, and "Idid give the man some candy."

Browning: (Q) Did you kill her?

Poyner: (A) Yes.

Spinner: (Q) Will you tell us about it?

Poyner: (A) I was at the Pantry Pride on Pembroke Avenue in Hampton. I saw the lady walking toward her car in the parking lot, and as she got in I did also and drove her to a side street and shot her.

Browning: (Q) Who was driving?

Poyner: (A) Me.

Browning: (Q) Where was the lady sitting?

Poyner: (A) Front passenger seat.

Browning: (Q) When did you remove her clothing?

Poyner: (A) I made her take her clothes off before I shot her.

Browning: (Q) Why?

Poyner: (A) So she wouldn't run away.

Browning: (Q) Why did you shoot her?

Poyner: (A) So she couldn't identify me.

Browning: (Q) What did you say to her?

Poyner: (A) I want your money.

Browning: (Q) How much money did you take?

Poyner: (A) Not very much, and that's all I want to say about it.

Talking about the incident seemed to upset the defendant.

Detective E. A. Browning Hampton Police Department	Detective C. D. Spinner Newport News Police Department

Spinner: (Q) Where is the gun?

Poyner: (A) I threw it in the water at Red's Pier.

Spinner: (Q) Would you show us where you threw the gun?

Poyner: (A) Yes.

Spinner: (Q) What did you do with her pocketbook?

Poyner: (A) I put it in the drainage ditch on Madison Avenue.

Spinner: (Q) Will you show us where you put the pocketbook?

Poyner: (A) Yes.

Spinner: (Q) What were you wearing when you shot the woman?

Poyner: (A) Blue jeans, blue and white tennis shoes and a light tan short sleeve shirt.

Poyner: (Q) Can I call my wife?

Spinner: (A) Yes. (At this time he did call)

He was given some coffee and no other personnel in the Police Department were

permitted to speak with him. At 0250 a.m. we then took the defendant in handcuffs and drove to Red's Pier. Prior to leaving the Station, we asked that the diving team from the Fire Department meet us there. Also, the defendant was allowed to use the rest room.

Arrived 0300 a.m. at Red's Pier. After arriving at Red's Pier the defendant got out of the vehicle and pointed in the direction he threw the gun. We stayed there for a little while and assisted the divers. At 0320 a.m. we left Red's Pier and drove back to the Police Station and added to search warrant the clothing that the defendant stated he was wearing at the time he shot Mrs. Hedrick and the fact he was arrested at 126 Poplar Avenue.

0337 a.m. The Search Warrant was sworn and signed by Detective Spinner and given to Detective Seals and Detective Williamson of the Newport News Police Department to be executed.

0350 a.m. We arrived at Madison Avenue and Nansemond Drive, where the defendant showed us where he supposedly placed the pocketbook that he had removed from Mrs. Hedrick's car. Located at the exact spot wasa black pocketbook belonging to a Celestine Rainey.

Detective E. A. Browning Hampton Police Department	Detective C. D. Spinner Newport News Police Department

During the time we were on Madison Avenue, we were advised by Detective Williamson, by radio at 0425 a.m. that they had located a .38 calibre pistol at the address that they were searching.

After leaving Hadison Avenue we stopped at the 7 Eleven Store on Marshall Ave. and bought the defendant an apple danish and a cup of coffee.

Browning: (Q) Would you mind showing us the route you took from the Pantry Pride Store?

Poyner: (A) Alright.

We proceeded to Pembroke Avenue and Downing Street where the Pantry Pride is located.

Browning: (Q) Where was her car parked?

Poyner: (A) In front of the Chic-A-Sea.

He showed us in front of the Chic-A-Sea facing at an angle in the first row. He showed us where he was standing when he saw her and also showed us where he shot her in front of 663 Bell Street.

After he told us the route he took, we stopped at his residence on Poplar Avenue and picked up a leather pouch

that contained some money of his. (Stopped at defendant's request)

0535 a.m. We arrived back at Police Headquarters. The defendant was taken back to the Detective Bureau and questioned pertaining to the gun being in the water at Red's Pier. The defendant then made the statement that the gun was not in the water but was the one the detectives had found in his room.

0545 a.m. The defendant was allowed to use the rest room and also make a call to his wife.

Spinner: Q) Is Carolyn Hedrick's pocketbook in the drain on Madison Avenue?

Poyner: (A) I didn't put it there.

We then talked to him about the gun that was recovered at his residence and told him that the gun would be checked against the other murders in Newport News, Hampton and Williamsburg, and if he knew anything about them, to tell us now.

0605 a.m. Poyner made the statement, "I did them all." At this time, a short synopsis, on tape was taken from Poyner

describing each murder case. (Tape ended at 0628 a.m. 2/4/84)

Spinner: (Q) Tell us about Williamsburg.

Poyner: (A) I drove up 64 and got off at Williamsburg and stopped at the motel and saw two ladies in the kitchen and asked them for the money and shot them.

Spinner: (Q) What car did you use?

Poyner: (A) A brown Buick.

Spinner: (Q) Tell us about High's Ice Cream in Newport News?

Poyner: (A) As I was riding down Warwick Blvd. I noticed she was alone in the store. I made a right turn and went in and robbed her and shot her in the head.

Spinner: (Q) Tell us about the S & E Beauty Salon in Hampton, Virginia?

Poyner: (A) I drove up in front of the store, and went in and robbed her and shot her in the head.

Spinner: (Q) What car were you driving?

Poyner: (A) A green Ford I stole on Bellwood Road in Newport News.

We let the defendant call his wife again.

0645 a.m. We let the wife visit the defendant at his request. He gave his wife a fifty dollar bill from the leather pouch that we picked up at his residence.

0720 a.m. The defendant was taken to booking.

The interview was concluded due to the fatigue of both investigators, and the fact that they had been up for a period of 23 hours.

February 4, 1984

Defendant - Syvasky L. Poyner reinterviewed reference the murders.

8:50 p.m. Rights Waiver Form executed by Detective C. D. Spinner.

9:00 p.m. Form completed, defendant verbally stated he understood his rights and signed the form in the presence of Detective E. A. Browning.

Detective Spinner made a request of the defendant to tape and film his confession, using audio visual equipment, and he agreed to this. We escorted him to the second floor classroom where his statements were recorded.

9:40 p.m. Permitted defendant to call his wife. She was not in, however, he spoke with his brother-in-law, Fulton Gatewood, Jr.

9:50 p.m. Defendant permitted to view recording. Officer K. S. Fix of the Newport News Police Department ran the equipment. After the defendant reviewed the film he was asked if it was correct, and he replied that it was.

Defendant escorted to Detective Bureau Office by Detectives Browning and

Spinner Detective Browning asked defendant why he had killed them all. Defendant said, So they couldn't identify me." Poyner added, "I had spoke to people in jail for robbery that had wished they had killed the people they had robbed."

February 5, 1984

12:17 a.m. Returned defendant to jail.

Detective E. A. Browning Hampton Police Department	Detective C. D. Spinner Newport News Police Department

February 5, 1984

2:45 p.m. Detective Spinner received a phone call at home from Sergeant Musgrove of the Hampton Police Department that Poyner wanted to see Spinner or Browning.

3:00 p.m. Detective Spinner went to the defendant, Poyner's cell. Poyner told me to go over across from Sonny's on 25th Street, in the alley, and I would find the pocketbook from Williamsburg.

3:40 p.m. Detective Spinner and Detective Wescott went to the 1400 block of 25th Street on information furnished by Poyner. The pocketbook along with other cosmetic items was recovered and tagged as evidence. Returned to Poyner's cell along with Detective Browning and he advised that in the 1400 block of 31st Street there was personal property belonging to the victim, Carolyn Hedrick.

4.50 p.m. The property was located and collected and tagged as evidence. The defendant was furnished two packs of Newport cigarettes in the city jail lock up.

All the interviews with Syvasky Poyner were conducted at 224-26th Street, Newport News, Virginia on the 3rd floor

Detective E. A. Browning Hampton Police Department	Detective C. D. Spinner Newport News Police Department

of the Public Safety Building with the exception of the taped audio visual which was done on the second floor in the Police Classroom. The room on the third floor where the interviews were conducted is described as follows:

> Private office, comfortably furnished with wood paneling on one wall, picture of a Navy ship in a frame, two filing cabinets, and a credenza on one wall. The room is 10' X 10' with a 10' ceiling, and is well lighted. This office is in sharp contrast to a standard police interview room.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SYVASKY LAFAYETTE POYNER,
Petitioner,

v.

TONI V. BAIR,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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5

QUESTION PRESENTED

SHOULD THIS COURT EXERCISE ITS CERTIORARI POWER TO REVIEW ISSUES WHICH, ALTHOUGH PRESENTED TO THE COURT BELOW, WERE NOT CONSIDERED ON THEIR MERITS BECAUSE THEY WERE FOUND TO BE PROCEDURALLY BARRED BY VIRGINIA LAW, A RULING THAT POYNER DOES NOT CHALLENGE?

REASONS FOR DENYING THE PETITION

Poyner presents five questions to this Court for certiorari review dealing with the admission into evidence of his confession to five murders in his three separate trials in the following Virginia circuit courts: Newport News, Hampton, and Williamsburg & James City County. His questions I, II, III, and V were raised at trial and on direct appeal three years ago and found meritless by the Virginia Supreme Court. *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985). That opinion, however, is *not* at issue here and, in fact, this Court has already denied certiorari review on direct appeal. *See Poyner v. Virginia*, 474 U.S. 865 (1985) (Newport News and Williamsburg); *Poyner v. Virginia*, 474 U.S. 888 (1985) (Hampton).

Poyner then filed separate habeas corpus petitions in the three state circuit courts. He again raised his issues I, II, III, and V and asserted issue IV for the first time. The state circuit courts never reached the merits of these claims because they were found to be procedurally barred from state habeas corpus review by the rules of *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969) (habeas corpus is not a substitute for direct appeal in Virginia), *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975) (claims not raised at trial and on appeal are not cognizable in Virginia habeas corpus), or *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) (repetitious claims previously adjudicated in state or federal court not cognizable in Virginia habeas corpus).

The substantive merits of the questions that Poyner presents were not reached by either the state habeas courts or the Virginia Supreme Court. The *only* issue that Poyner could therefore raise here at this time is whether the Virginia Supreme Court correctly affirmed the state habeas courts' application of Virginia procedural law as barring these claims. Poyner, however, does not challenge this ruling. Instead, he simply ignores the procedural bars and presents his substantive claims.

Rule 17.1 of the Rules of the Supreme Court provides that the writ of certiorari "will be granted only when there are special and important reasons therefor." Subsections (b) and (c) of Rule

17.1 make clear that certiorari review is appropriate only for state court decisions involving matters of federal law.

In the case at bar, the state habeas courts and the Virginia Supreme Court expressly relied only on state law in their decisions dismissing Poyner's claims, rulings which Poyner does not challenge. No federal question was entertained. This Court therefore lacks jurisdiction to review Poyner's substantive claims. *See Michigan v. Long*, 463 U.S. 1032 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

CONCLUSION

There are no special or important reasons in this case for this Court's review; neither is there a federal question at issue. The respondent therefore prays that this Court will deny the petitions for a writ of certiorari.

Respectfully submitted,

Toni V. Bair,
Respondent herein.

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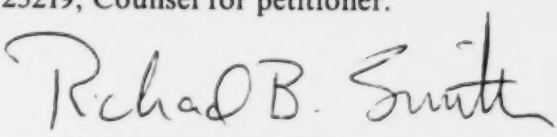
CERTIFICATE OF SERVICE

I, Richard B. Smith, a member of the Bar of this Court and Counsel for respondent, hereby certify that I have this 30th day of August, 1988, served this Brief in Opposition to Petitions for a Writ of Certiorari upon the petitioner by causing three copies of such document to be mailed to Alexander H. Slaughter, Esquire, McGuire, Woods, Battle & Boothe, One James Center, Richmond, Virginia 23219, Counsel for petitioner.



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OCTOBER TERM, 1988

SYVASKY L. POYNER,

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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14

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATUTORY PROVISIONS iii

REPLY BRIEF 2

CONCLUSION 10

TABLE OF CITATIONS

	PAGE
Bland v. Johnson, 495 F. Supp. 735 (E.D. Va. 1980)	6
Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969)	2
Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970)	2, 5, 6, 7
Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975)	3, 7-10

STATUTES

Va. Code § 8.01-663	5

STATUTORY PROVISIONS

§8.01-663. Judgment Conclusive.
Any such judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment.
(Code 1950, § 8-605; 1977, c. 617).

REPLY BRIEF

Respondent opposes certiorari review by stating that this Court lacks jurisdiction because no federal question "was entertained" in the state habeas corpus proceeding below. Respondent's argument is a ruse to avoid consideration of the constitutional violations apparent in the way Mr. Poyner's confession was obtained and used against him.

Respondent's argument is that in Virginia, the writ of habeas corpus is no longer available to remedy constitutional error if (i) the error was raised at trial or on direct appeal, citing Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970); Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969), or (ii) the error was not raised at trial or on

direct appeal, citing Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). Respondent essentially argues that principles of collateral estoppel and res judicata apply to habeas corpus petitions.[1] The conclusion of

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[1]Respondent's Brief also inaccurately asserts that questions II, III and V as stated in the Petitions for Certiorari were raised at trial and on direct appeal and found meritless by the Virginia Supreme Court. Mr. Poyner's Petitions for Certiorari concern three trials, in three Virginia courts (Hampton, Williamsburg, and Newport News), and three direct appeals, each handled by different counsel. Examination of trial counsels' Motions to Suppress the Confession, transcripts of the Motion hearings and the appellate briefs shows that questions II, III and V were not articulated in every case; rather, the reasons advanced at various stages for suppressing the confession were vague and mixed. On direct appeal, the Virginia Supreme Court found that the confession was admissable because

(Footnote Continued)

Respondent's theory is that Mr. Poyner can assert only one claim in a habeas corpus petition - ineffective assistance of counsel.

Respondent's expansive interpretation of Virginia law strips the habeas corpus writ of any usefulness except in prosecuting the right to counsel. Virginia's Supreme Court has

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(Footnote Continued)
(1) Poyner's statement was not a request for counsel, 229 Va. at 410-411 (Hampton appeal and Newport News appeal); (2) Poyner initiated further communication with the interrogating detectives, 229 Va. at 411 (Hampton appeal); (3) Poyner's will was not overborne so that his statement was "voluntary", 229 Va. at 411 (Newport News appeal); and (4) the written warning given to Poyner before the videotape session rendered the confession "constitutionally sufficient" even if a prior warning had been defective, 229 Va. at 408 (Williamsburg appeal).

never confined habeas corpus petitions to this limited role.

Virginia law expressly authorizes the litigation of constitutional claims in a habeas corpus action, although repetitious petitions may be dismissed summarily. Va. Code § 8.01-663 provides that "[a]ny such judgment entered of record [after hearing on the habeas corpus petition] shall be conclusive . . . except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment." In Hawks v. Cox, the Virginia Supreme Court applied the predecessor statute to Va. Code § 8.01-663 to bar repetitive habeas corpus petitions, but expressly rejected the Attorney General's suggestion that res judicata should apply. The Court

considered Hawks' petition an abuse and a frivolity -- his earlier petitions for the Great Writ had been resolved by state and federal courts, and his case at bar stated nothing new. Accord Bland v. Johnson, 495 F. Supp. 735 (E.D. Va. 1980)(characterizing Hawks as a "writ-writer"). Hawks did not appeal his conviction; he litigated through successive habeas corpus petitions in the state and federal courts. Mr. Poyner has filed only one habeas corpus petition in each jurisdiction where he was convicted and sentenced to death.

The precise ruling of Hawks v. Cox was that when a court determines that a habeas corpus petition is repetitious, and adds nothing new to a prior adjudicated habeas corpus petition, the court can dismiss the petition, without

appointing counsel, under Va. Code § 8.01-663. In Hawks v. Cox the Court expressly stated that it would not modify the common law rule that principles of res judicata do not apply in a habeas corpus proceeding. 211 Va. at 95, 175 S.E.2d at 274. The Court did not hold, as stated by Respondent, that "repetitious claims previously adjudicated in state or federal court [are] not cognizable in Virginia habeas corpus." (Respondent's Brief at 2).

Likewise in Slayton v. Parrigan the Virginia Supreme Court did not hold that "claims not raised at trial and on appeal are not cognizable in Virginia habeas corpus." (Respondent's Brief at 2). In Slayton v. Parrigan, the Court applied the familiar rule of evidence whereby petitioner's failure to object

to identification evidence at trial resulted in a loss of the objection. Slayton first raised allegations that a pretrial identification procedure was illegal during an evidentiary hearing on his habeas corpus petition. 215 Va. at 28; 205 S.E.2d at 681. Because Slayton did not attack the pretrial identification procedure at trial, Slayton lacked standing to make that attack in a habeas corpus proceeding.[2] To allow a prisoner to challenge evidence

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[2] The Virginia Supreme Court stated: "[t]he sole issue on this appeal is whether the petitioner has standing in a habeas corpus proceeding to attack an alleged impermissibly suggestive pretrial identification as tainting the in-court identification when he did not present that defense at his criminal trial and upon appeal from that conviction." 215 Va. at 28; 205 S.E.2d at 681.

for the first time in a habeas corpus proceeding would "circumvent the trial and appellate processes." Id. at 30; 205 S.E.2d at 682.

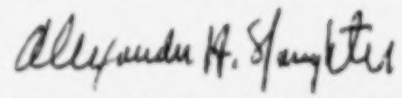
Here, Mr. Poyner did challenge the confession evidence at trial; he moved to suppress it before each of three trials. Unlike Slayton, Poyner created an undisputed facutal record with respect to the alleged violations of his 5th and 14th Amendment rights. For example, the record shows that the interrogating detectives interpreted Poyner's statement ("Didn't you say I had the right to an attorney") as a request for counsel. This conforms to the Virginia Supreme Court's view in Slayton v. Parrigan that "[t]he trial and appellate procedures in Virginia are adequate in meeting procedural

requirements to adjudicate state and federal constitutional rights and to supply a suitable record for possible habeas corpus review." 215 Va. at 30; 205 S.E.2d at 682 (emphasis added). The issue in the habeas corpus action for which Poyner seeks certiorari review was whether that record revealed constitutional error; there was no issue as to whether Mr. Poyner had preserved his objection to the confession evidence.

CONCLUSION

Petitioner respectfully asks that this Court grant the Petitions for Writs of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Alexander H. Slaughter, certify that I mailed first class, postage prepaid, three (3) copies of this Reply Brief in Support of Petitions for a Writ of Certiorari to Richard B. Smith, Assistant Attorney General, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219, counsel of record for respondent below, on this the 13th day of September, 1988.

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Counsel of Record